REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

MICHAELMAS TERM, 10 VICT.,

TO

EASTER TERM, 10 VICT., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,
OF THE MIDDLE TEMPLE, BARRISTERS-AT-LAW.

VOL. XVI.

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1849.

ADVERTISEMENT.

THE Editors are unwilling to close this Series of Reports without expressing publicly their acknowledgments of the uniform courtesy and consideration which have been extended to them by the learned Judges who have presided in the Court of Exchequer during the long period of their labours, and particularly for the assistance rendered them in the communication and revision of the judgments.

It is proper to state, that a few of the cases in the Fifteenth Volume were reported by R. P. TYRWHITT, Esq., and the greater part of those in the Sixteenth Volume by that Gentleman and E. T. HURLSTONE, Esq.

The GENERAL INDEX to the whole Series has been compiled with much care by EDWARD WISE, Esq., and will, it is hoped, be found useful to the Profession.

TEMPLE, *February*, 1849.

JUDGES

OF THE

COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir ROBERT MONSEY ROLFE, Knt.
Sir THOMAS JOSHUA PLATT, Knt.

ATTORNEYS-GENERAL.

Sir THOMAS WILDE, Knt. Sir JOHN JERVIS, Knt.

SOLICITOR-GENERAL.

Sir DAVID DUNDAS, Knt.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

ERRATA.

Page 255, *line* 15, *for* "due then," *read* "then due."
337, *dele the note* (*a*).
348, *line* 22, *for* "or," *read* "as."
539, *line* 21, *for* "lease," *read* "use."
540, *line* 3 *from bottom*, *for* "that interest," *read* "a chattel interest."
584, *line* 14 *of marginal note*, *for* "inclosed," *read* "indorsed."

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taining the same, the defendants say, that, before and at the time of the death of the said J. Price in the declaration mentioned, and before the said time when &c., in that count mentioned, one J. G. W. was, and still is, lord of the manor of E. H., in the county of H., and that the said J. Price, before and at the time of his death, was seised in his demesne as of fee at the will of the lord, according to the custom of the said manor, of and in a certain customary tenement then and still being parcel of the said manor, demised and demisable by copy of the court rolls of the said manor, according to the custom of the said manor, to wit, of a certain tenement, consisting of divers, to wit, three acres of arable land, formerly held with a certain messuage and garden, called and known as the Upper House, which said tenement was and is situate in the parish of K., in the county aforesaid, and within the manor aforesaid. And the defendants say, that within the same manor there now is, and from time whereof the memory of man is not to the contrary, continually hath been an ancient custom there used and approved, that the lord of the said manor hath seized and taken, and been accustomed to seize and take, and still ought to seize and take, upon and after the death of every tenant dying seised in his demesne as of fee of any customary tenement within the same manor, held of and at the will of the lord, according to the custom of the said manor, demised and demisable as aforesaid, in respect of such tenement whereof such tenant hath died so seised, the best beast which was of the said tenant at the time of his death, as and for and in the name of a heriot custom. And the defendants further say, that, before the said time when &c. in the said second count mentioned, to wit, on &c., the said John Price, so being tenant of the said tenement as aforesaid, died so seised thereof as aforesaid, whereupon afterwards, to wit, at the said time when &c., in the said second count mentioned, the defendants, as the servants of the said J. G. W., so then being lord of the manor as aforesaid, and by his com-

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the said trespasses in the said fifth plea mentioned, and therein attempted to be justified; wherefore, &c.

Like replication to the sixth plea, and new assignment to that plea.

The plea in bar to the new assignment to the fifth plea, justified the taking in respect of the tenement at Flood Gates Bridge, in the same way as in the *sixth* original plea. The plea in bar to the new assignment to the sixth plea, justified in like manner the taking in respect of the tenement of Upper House, as in the *fifth* original plea.

Replication to pleas to new assignment.—And as to the general pleas of the defendants by them secondly and lastly above pleaded to the said trespasses above newly assigned, the plaintiffs, admitting that the said J. G. W. was lord, and that the said J. Price was and died seised as in those pleas respectively mentioned, say that the defendants of their own wrong, and without the residue of the said cause by them in their said last-mentioned pleas severally and respectively above alleged, committed the trespasses secondly and lastly above newly assigned, modo et formâ, as the plaintiffs have above thereof complained: concluding to the country.

Special demurrer, assigning for causes, that a replication ought to have been pleaded separately to each of the said pleas, and not one replication to both. That the replication, even taken as separately applicable to each of the pleas, attempts to put in issue several material and traversable allegations in such plea, and is multifarious. That the defendants by their said pleas respectively claim an interest in and title to the subject matter of the alleged trespass, antecedent to the committing of the trespasses themselves, and that the replication de injuriâ suâ propriâ is inapplicable to such a plea.—Joinder in demurrer.

Hugh Hill, for the defendants, in support of the demurrer. —The replication de injuriâ is inapplicable, for the pleas do not consist merely of matter of excuse, but of matter of

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is supposed to have knowledge of his testator's contracts. [*Alderson*, B.—The terms of the third resolution in *Crogate's case* are, authority or power mediately or immediately derived "from the plaintiff" (*a*), without adding "or those through whom he claims." It however proceeds, "The same law of an authority given by the law, as to view waste, &c." *Parke*, B.—One of the cases quoted by Lord *Coke* to support the last position is the Year Book, 12 Edw. 4, 10 b, but there the issue involved the disseisin of the lessor (*b*). The chattel being vested in the executors, they have no power which is not derived from their testator, so that the same principle of pleading is involved.]

Keating, contrà.—If a replication de injuriâ is at all admissible in this case, one such replication is sufficient to put in issue both pleas, for the absque residuo causæ refers to every thing in each of them, in the nature of a general issue. Comyns's Digest, Pleader (F. 24), citing 1 Leonard's Rep. 124; *Fish* v. *Brocket* (*c*); *Curtis* v. *Bateman* (*d*). Nor does the plea aver any such "matter of interest whatsoever" in a chattel, as brings this within the second resolution in *Crogate's case* (*e*). Chief Baron *Comyns*, in his Digest, tit. Pleader (F. 19), adopts Brook's Abridgment, tit. De son tort demesne, pl. 5, 10 (*f*), where it is said, that, in trespass, if the defendant by plea justifies the taking for a heriot, the general replication de son tort demesne is good. The authorities cited by Brook are, the Year Book, 44 Edw. 3, 13, 38 Edw. 3, 7; and those authorities expressly apply, though cases of heriot service, in which the

(*a*) See Tyrwhitt on Modern Pleading, &c., 609, 610, 613; also 5 Ad. & E. 238.

(*b*) See another comment of the same learned judge, on 12 Ed. 4, 10 b, in 3 Ad. & E. 13, *Selby* v. *Bardons*.

(*c*) Dyer, 182 a, pl. 54, Easter Term, 2 Eliz.

(*d*) Siderfin, 39; 13 Car. 2.

(*e*) 8 Rep. 67 a.

(*f*) Cited also in Kitchen on Courts, 447; Watkins on Copyholds, 1st ed. 168; 2nd ed. 180.

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Nov. 20.

BENTON and Another *v.* POLKINGHORNE.

After judgment for defendant on demurrer to one of several counts, the plaintiff took out a side-bar rule to discontinue the action generally, (see Reg. Gen., Hil., 2 Will. 4, art. 106). The defendant's costs, not of the demurrer only, under 3 & 4 Will. 4, c. 42, s. 34, but of the whole action, were taxed on the rule to discontinue, treating that rule as the termination of the action, and were received by defendant's attornies as defendant's costs "on discontinuance of the action." Judgment was entered up on the record for the defendant on the first count only:—*Held*, that the discontinuance, being issued after judgment without leave of the Court, was irregular, and that the judgment was also irregular. The judgment was set aside without costs.

ASSUMPSIT.—The declaration contained a special count, with indebitatus counts. Demurrer to the first count, and plea of non-assumpsit to the residue. On the 8th of June, 1846, the defendant had judgment on the demurrer, and the rule for judgment was served on the plaintiffs' attorney. On the 10th, a side-bar rule to discontinue the action generally was taken out with costs, to be paid by the plaintiffs within four days, or the defendant to be at liberty to sign judgment of nonpros, (see Reg. Gen., Hilary, 2 Will. 4, art. 106). At the taxation on the 11th, the defendant's attorney tendered to the taxing Master his bill of costs, and the rule for judgment, in order to have the costs taxed on that rule under 3 & 4 Will. 4, c. 42, s. 34. The costs were not marked on it. The defendant objected, that, as the judgment was not final, costs could not be taxed on that rule, but on the rule to discontinue, which had terminated the action. The Master acceded to that argument, and gave his allocatur on the original rule to discontinue for the amount of the costs, including not only such as the defendant was entitled to on the demurrer, but also those of the whole action. On the 12th, the costs were paid, the defendant's attornies specifying them in their receipt to be defendant's costs "on discontinuance of the action." The other counts were left undisposed of. Judgment was entered up of record on the first count for the defendant. A second action was immediately commenced, and the plaintiffs declared for the breach of contract before intended to have been declared on, and also for a subsequent breach of it. The defendant pleaded to the first breach the judgment recovered, and demurred specially to the rest. On the 1st of July, a summons to set aside the demurrer as frivolous was discharged without costs. On the 6th of July, the declaration was amended on payment of costs of the amendment (not in-

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might have been confined to the counts left undisposed of, and to which there was no demurrer. Tidd, 9th ed., 679, says, "A rule to discontinue is never granted after a peremptory rule for judgment on demurrer (*a*)." [*Parke*, B.—There is no doubt that, after judgment or a general verdict, a rule to discontinue generally is irregular, unless granted on special application for that purpose, and on payment of costs. Could a discontinuance be had as to part? A nolle prosequi may be had either as to the whole or part.] The defendant never waived the judgment on demurrer, which he had obtained. If the judgment is not a bar, the plaintiffs may reply. In *Newton* v. *Holford* (*b*), the pleas in trespass for false imprisonment were, first, not guilty, and, secondly, a justification under a ca. sa. The plaintiff replied, the breaking open an outer-door; and, on rejoinder, the defendant had a verdict on the first, and the plaintiff on the other issue; but the defendant was held entitled to the general costs of the cause. [*Pollock*, C. B.—There is no such thing as a partial discontinuance of an action. You say that that proceeding was irregular; but that you agreed to it as far as it was available, not thinking it worth while to come to the Court to set it aside.]

Crompton, contrà, for the plaintiffs.—The plaintiffs cannot be fixed by the old judgment as to part of the record; when upon the roll, it is a judgment on the whole record. The defendant goes for costs of the action, including the discontinuance, and not for the costs of the demurrer only. Any irregularity in taking out a rule to discontinue, without leave of Court, has been waived by the defendants. In *Mayor, &c. of Macclesfield* v. *Gee* (*c*), the plaintiffs got judgment on demurrer to one special plea, and taxed the costs thereof.

(*a*) Citing 2 Saund. 73, note (1); *Turner* v. *Turner*, 1 Salk. 179.

(*b*) 1 C. B. 141.

(*c*) 14 M. & W. 470.

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lies in the county of Middlesex. The defendant, at the time the plaintiff was instituted and inducted to the said rectory, was, and to the time of filing the bill in Chancery after mentioned, continued to be, and still is, the occupier of an ancient dwelling-house situate in that part of the parish of Saint Andrew, Holborn, which lies in the county of Middlesex (*a*), and the plaintiff, as such rector, claimed to receive from the defendant the annual sum of 10*s.*, as a customary annual payment payable by the defendant as the occupier of the said ancient dwelling-house; and the plaintiff, previously to the summons after stated, caused several applications to be made to the said defendant for such payment, which the defendant refused to comply with, but did not state the ground of his refusal; and, at the date of the said summons, more than two years' arrears of the annual payments were due.

On the 24th March, 1841, the plaintiff caused the defendant to be summoned under the provisions of the acts of Parliament, 7 & 8 Will. 3, c. 6, 53 Geo. 3, c. 127, and 5 & 6 Will. 4, c. 74, before two justices of the peace for the county of Middlesex, for the purpose of enforcing the payment from the defendant, under the summary power of the said acts, of two years' arrears of the said annual payment of ten shillings.

The defendant attended such summons, and, upon the hearing thereof, denied the legal right of the plaintiff to the payment, on the ground that such payment was in itself illegal and unjust, and also that the dwelling-house occupied by the defendant, upon which the said payment was charged, was not in fact liable thereto; and the defendant also, upon the hearing of the said summons before the justices, verbally protested against their jurisdiction and authority to make any order upon such summons, upon both the grounds aforesaid, and also upon the ground that more than

(*a*) 7 & 8 W. 3, c. 6, therefore applied, notwithstanding s. 5.

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made, the plaintiff filed a bill in Chancery against the defendant to recover four years' arrears and upwards, of the tithe payments which were then due; and on the 2nd November, 1842, the defendant put in his answer thereto, and therein stated, that he did not question the plaintiff's legal right, according to the laws then in force, to have the payment in question made to him by the defendant; but the defendant insisted that the plaintiff's only remedy was under the statutes before referred to.

The questions for the opinion of the Court are,

1st. Whether, at the time of filing the bill, the plaintiff was entitled to institute a suit in equity for the recovery of the arrears of the annual payment of ten shillings due to him from the defendant.

2nd. Whether the plaintiff would have been so entitled, if the defendant had not disputed the plaintiff's title as aforesaid, or been summoned before the justices, regard being had to the fact that more than two years' arrears were due at the time of filing the bill (*a*).

The case was now argued by

Martin, for the plaintiff.—Stat. 5 & 6 Will. 4, c. 74, after shortly mentioning stats. 7 & 8 Will. 3, c. 6, 53 Geo. 3, c. 127, as to tithes in general, and 7 & 8 Will. 3, c. 34, and 1 Geo. 1, c. 6, as to Quakers, declares in the preamble that it is highly expedient, and would further tend to prevent litigation, if in the cases and with the exceptions thereinafter mentioned, all claimants (viz. of tithes not exceeding £10 in amount due from any one person) were restricted to the respective remedies provided by the recited acts, and enforces the proceedings before magistrates already sanctioned by those acts, subject to a proviso in

(*a*) Copies of the magistrates' order and the letters dated the 10th of December, 1841, and the 2nd of July, 1842, and the opinion of counsel therein referred to, accompanied this case, and were to be referred to by either party, if necessary.

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positions for their offerings, oblations, or obventions, "not amounting to the yearly value of 40*s.* due from any one person," to proceed before justices, who, however, by sect. 6, are not to hear any such complaint concerning such tithes, &c. *thereafter* due, unless it shall be made within the space of two years next after the times that the same tithes, &c., did become due or payable. That act left the common law remedy for such tithe payments, after the two years had elapsed, with an option to adopt it in the first instance. [*Rolfe*, B.—Sect. 14 did not oust the tithe owner of his right to proceed at common law.] By stat. 53 Geo. 3, c. 127, the justices received power to deal with *all* tithes in like manner; for, by sect. 4, they are to determine all complaints touching tithes, oblations, and compositions, "where the same shall not exceed £10 in amount from any one person," subject to all the provisions of stat. 7 & 8 Will. 3, c. 6; and by sect. 5, no action or suit to recover the value of *any* tithes is to be brought, except in six years from the time they became due. Next, it is enacted by 5 & 6 Will. 4, c. 74, s. 1, that no suit shall be instituted "in any of his Majesty's courts in England now having cognizance of such matter," (in which expression the ecclesiastical courts are now expressly included, by 4 & 5 Vict. c. 36 (*a*),) "for or in respect of *any* tithes, oblations, or compositions, withheld, *of or under* the yearly value of £10," (except in the cases provided for by 7 & 8 Will. 3, c. 6, and 53 Geo. 3, c. 127), but that all complaints touching the same shall (except in the case of Quakers) be heard and determined only under the powers and provisions contained in stats. 7 & 8 Will. 3, c. 6, and 53 Geo. 3, c. 127, "in such and the same manner as if the same were therein set forth and re-enacted," subject to the proviso already stated, that nothing in the act shall apply to cases where the actual title to any tithe, &c. "shall be *bonâ fide in question.*" [*Parke*, B.—That proviso has the same effect in respect to 4 & 5 Vict. c. 36.] The

(*a*) See 3 Stephen's Comm. 708.

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tithe is in question, the proceedings before justices may, by sect. 7, be removed by certiorari; and by sect. 6, no complaint shall be heard where the claim had arisen more than two years before. Next, stat. 53 Geo. 3, c. 127, s. 6, is a general statute of limitations on the recovery of all tithes, whatever their amount. Neither act provided a remedy in this case, as appears from the preamble of 5 & 6 Will. 4, c. 74, which recites that it would be expedient if in the cases, and with the exceptions thereinafter mentioned, claimants were restricted to the remedies provided by those acts (*a*). Stat. 5 & 6 Will. 4, c. 74, has no exceptions, but plainly enacts that a tithe owner shall not sue in the superior courts for tithe, except it exceeds £10 in value. Stat. 53 Geo. 3, c. 127, contains no powers for recovering tithe in arrear, and that gets rid of the difficulty; for it means, that, if the yearly value is under £10, the proceeding shall be under 7 & 8 Will. 3, c. 6, which is only incorporated into 5 & 6 Will. 4, c. 74. But the latter act expressly enacts, by sect. 1, that there shall be no suit in the superior courts at all, except in the cases there provided. Sect. 6 of 7 & 8 Will. 3, c. 6, is a limitation, not on the subject of jurisdiction, but merely on the exercise of it by the justices: *King* v. *Wakefield* (*b*). The object of the legislature may be to prevent arrears of tithes, the right as to which is undisputed. [*Rolfe*, B.—That would be reasonable; but a party may run several years in arrear by disputing his liability, and then it would be unreasonable to shut out the claim of any such arrears if limited to six years]. *Payton* v. *Watson* (*c*) has, at least incidentally, decided this point. [*Parke*, B.—It was not expressly raised there.] If the tithe is to be claimed according to 5 & 6 Will. 4, the remedy is only before the justices. It is manifestly intended, that, where there is no dispute, the tithe owner cannot recover more than two years' value in any event. No appli-

(*a*) See the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 81.

(*b*) 1 Burr. 485.

(*c*) 3 Q. B. 658.

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of 5 & 6 Will. 4, c. 74, s. 1, that point could not have been raised at all.]

Lastly, the defendant's notice to the justices, that he disputed the title to the tithe, was not in writing under s. 8 (*a*), so that, had he moved for a certiorari, he would have been met by proof that no question of title had been raised according to 7 & 8 Will. 3, c. 6, s. 8. He cited *Rex* v. *Wakefield* (*b*). [*Parke*, B.—Before the justices, you say the claimant had no title, and drive him to file his bill, and now you say that you never disputed his title in any valid manner.] A defendant may, under 7 & 8 Will. 3, waive his objection, if it has not been delivered in writing. [*Alderson*, B.—That writing was intended to give the tithe owner time to consider whether he should go before a magistrate, or to other courts, as he might then do. I agree, that, if both parties consent, magistrates may try the existence of a modus.]

Martin replied.

POLLOCK, C. B.—We have to put the best construction we can on three acts of Parliament, 7 & 8 Will. 3, c. 6; 53 Geo. 3, c. 127; and 5 & 6 Will. 4, c. 74, which at various intervals have been engrafted on each other. Whatever difficulty may arise in the due exposition of such a class of statutes, I believe that the task of so framing them anew as to be free from objection is still more arduous, especially where, instead of re-casting them entirely, the system is followed of reciting, amending, and partially adopting those which have preceded. The first question put to us by the Vice-Chancellor appears to raise the point, whether a claimant of tithe is entitled to file a bill in equity for more than two years' arrears of ancient composition for tithe, where he began proceedings before justices at a time

(*a*) Quære, if sect. 8 applied to this particular claim or defence.
(*b*) 1 Burr. 485.

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ceeding two years, give the owner of it a right to sue in equity to recover it? I answer, no; for unless the title was disputed between the parties, the mere fact of letting the tithe run in arrear for that period would not give him such right.

PARKE, B.—I entirely agree with the Lord Chief Baron, and think there is no difficulty in the case when it is considered. It appears to me, that, after what was stated by the defendant before the magistrates, the claimant of this composition or tithe had a right, if he chose, to consider the title and the liability of the particular house to be matters then bonâ fide in question, though it might have been otherwise, had the claim been resisted in any manner obviously the reverse of a grave denial. The question whether the objection to the claim was made bonâ fide, or merely put forward to oust the jurisdiction of the magistrates, might be tried in an action of trespass, if the claimant of the tithe had proceeded further under the acts; but when the party charged with it seriously says he is not liable, the tithe owner may take him at his word, and file his bill against him, as at common law he was entitled to do: for as "allegans suam turpitudinem non audiendus est" (*a*), the tithe payer cannot be admitted on a subsequent occasion to say that the title to the composition was not bonâ fide in question before the justices. The next point is, whether the limitation of suits for tithes, in sect. 6 of 7 & 8 Will. 3, c. 6, applies to this case; if it does, the consequence will be, that the tithe owner's only remedy is on stat. 5 & 6 Will. 4, c. 74, which prevents him from proceeding in any of his Majesty's courts then having cognizance of the matter, for tithes withheld of or under £10 yearly value. Thus, if a claim within these acts is not brought forward before magistrates within two years, all that accrued due before the two years next antecedent to the time of the complaint is lost; where-

(*a*) 4 Inst. 279.

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period less than two years. On the other hand, in cases where any such question is raised before magistrates, the common law remedy remains, but limited to six years' arrears by sect. 5 of 53 Geo. 3, c. 127. Every word of the earlier acts receives effect on this construction. Then, to what extent is the tithe owner compelled to go before magistrates, instead of suing in the superior courts? The answer is, that he is so compelled in cases of arrears of undisputed tithe, of any amount not exceeding £10 in the aggregate, as the utmost value due from any one person; and that if such claim is disputed there, he can sue in equity, or the ecclesiastical court, for no more, however, than six years' arrears. As to the title or liability to payment of tithe being bonâ fide (*a*) in question, the claimant may say that the tithe payer does not really mean to deny the title to the tithes, or to assert his own right to retain them, and may give evidence to shew that a merely colourable title is set up. But neither party can at any time successfully rely on his having knowingly stated a falsehood at some other time.

The first of the Vice-Chancellor's questions will therefore be answered in the affirmative; and the second in the negative, or that, if the title is not in question, the owner has no right to sue in equity. I think, however, that if a party by letter denies a claimant's right to tithe, it is "in question" or dispute; so that a bill would lie without any necessity to summon the defendant before magistrates (*b*).

ROLFE, B.—I am desirous to guard myself against giving any decided opinion on several points raised in the course of this hearing. At common law, a tithe owner had a right to file a bill in the courts of Exchequer or Chancery, or to sue in the ecclesiastical courts for his tithe. To remedy the incon-

(*a*) As to the term "bonâ fide" in an act, see 10 Ad. & E. 789, 791; 3 Bing. N. C. 400; 5 B. & Ald. 146.

(*b*) See 7 & 8 Will. 3, c. 6, s. 8.

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Nov. 9.

HURLEY *v.* BAKER.

S., the owner of a farm, orally employed defendant to sell it for him. Defendant, without naming the seller, agreed, by written memorandum, to sell the farm to the plaintiff for £2700, and gave instructions to an attorney to prepare a contract of sale by S. to plaintiff. Plaintiff paid defendant £100 deposit in part of the purchase-money, and afterwards signed the contract for sale by S. to himself, by which contract he agreed to pay down immediately on its execution £100, as a deposit, for which S. undertook to pay interest at £4 per cent. till the completion of the purchase. The contract was afterwards rescinded for want of title in the seller S. Defendant, before he had notice of the rescinding, paid S. £50, and retained the other £50, though without the consent of S., under an agreement by S. to give him one half of any amount above £2600, which defendant might get for the farm:—*Held*, that plaintiff could not recover any part of the £100 from defendant.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial, at the last Somersetshire assizes, before *Platt*, B., it appeared that in 1843, Salter, the owner of a farm called Sloughpool, was an old man in bad circumstances, and had employed the defendant to sell it for him. It was accordingly advertised by Gribble, an attorney, for sale, but was not then sold. On the 21st of September in that year, the defendant signed the following memorandum:—

"21st September, 1843. Memorandum:—E. Baker has agreed to sell Mr. Hurley Sloughpool estate, and two pieces of land, called Broadmoor, all in the parish of Cullompton, with the corn-tithes or rent-charge on Sloughpool, as mortgaged to Mr. Marker, on the following conditions, (and all parties to execute a proper contract for carrying the same into effect), on which Mr. Hurley has paid to E. Baker a deposit of one hundred pounds, and to pay the remainder of purchase-money at Lady-day next, when he is to have full possession, namely, £2600, making together £2700; Mr. Hurley to be allowed interest for the one hundred pounds paid, at the rate of £4 per cent. per annum.—Witness my hand, "E. BAKER."

Gribble deposed, that, before the 21st of September, he had instructions from the defendant to prepare a contract of sale from Salter to the plaintiff, which was dated on that day, but not executed by either of them till the 23rd. It purported to be made between Mr. Salter, of &c., "for himself, his heirs, executors or administrators, of the one part, and Richard Hurley, of &c., for himself, his heirs, &c. of the other part. Wm. Salter agreed to sell to the said Richard

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fendant was also shewn to have acted for the plaintiff in getting a tenant for the farm, in case he should complete the purchase of it. The plaintiff now sought to recover from the defendant the £100, alleging that he had paid that sum to him, either as his (the plaintiff's) agent, or as a depositary, or at least that he was entitled to recover any sum not paid over on this account by the defendant to Salter before the 30th of August, 1844. The defendant contended, that the plaintiff should be nonsuited, as the final contract of sale treated the £100 deposit as paid to Salter, charging him with interest on it; and a deposit had been paid accordingly into his hands, notwithstanding the memorandum signed by the defendant. The learned judge inclined to nonsuit, but expressed a wish to hear the defendant's evidence. He therefore shewed, by one Hill, that, in September, 1843, Salter told the defendant that he could not sell the farm for more than £2600, and begged the defendant to sell it for him. The witness, Hill, said to the defendant, in Salter's presence, that Salter would give the defendant half of whatever sum he could obtain above that amount. The defendant then gave Salter a check for £50, which was paid him. Salter was not called. The learned Baron then told the jury, that if the defendant had only acted as Salter's agent, and had paid him the £50 before the 30th of August, 1844, when the defendant had notice that the contract had been rescinded, he would not be liable as to that sum. As to the other £50, he left it to the jury to say whether the defendant had ever paid Salter that sum before he had notice of the rescinding of the contract, or whether Salter had assented to his keeping it. The jury found that he had not so assented. The plaintiff was thereupon nonsuited, with leave to move to enter a verdict for the plaintiff for £100, or for the £50 not shewn to have been paid over to Salter by the defendant.

Kinglake, Serjt., now moved to enter a verdict for

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the other judges rested the decision against the plaintiff on the ground of the payment over having been before notice. The defendant must have received the money on the 21st of September to hold as agent of the plaintiff till a more perfect security was prepared.

PARKE, B.—I think no rule ought to be granted. The preliminary contract keeps back the name of Salter, so that the defendant appears to be the seller of the estate. Reading that paper with the other, it shews that the defendant, in the first, is in the position of Salter in the second. In this state of things, it appears that the defendant was not intended to be liable for a return of the deposit; for the transaction is as if the money had been paid on the 21st to Salter himself, and as if it had then been received by him, he being to pay the interest on it till the purchase should be completed. The cases as to recovering against agents do not apply, for here the plaintiff has assented to the payment over to Salter.

ALDERSON, B.—In this case the money is not paid to Baker by the plaintiff, but to Salter. The passage cited from Story on Agency applies to cases where the agents originally received the money improperly; for he adds, "If a portion of the money has been paid over to the principal before notice of the recall, the agent will not be liable; unless, indeed, the receipt of the money by the agent was obviously fraudulent and illegal, or his authority to receive it was known to himself to be utterly void."

ROLFE, B.—I am of the same opinion. The case is just the same as if the payment had been made to Salter at first. It is sought to charge the defendant, who acted on the 21st for an unknown principal; but, two days afterwards, that principal, Salter, admits—You, the defendant, paid that sum to me, and I will pay interest for it. Then how can the

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next day. On the 11th, the defendant's attorney served a copy of the above rule on the plaintiff's attorney. No notice was given to the under-sheriff by the defendant to retain the writ of trial, without delivering it to the plaintiff's attorney after the said four days (*a*).

On the 17th of November, *Otter* obtained a rule for discharging *Kennedy's* rule of the 10th of November. The affidavits used for shewing cause stated, that, before the first four days of term had expired, the defendant's attorney informed the plaintiff's attorney that he had instructed counsel to move for a nonsuit; and that, if it could not be moved in the four days, it would be inserted in the reserved list; and that the above cause was so inserted in the reserved list within the four days, with the name of the counsel attached thereto, as by reference to the list would appear. [*Parke*, B.—It is not enough to put down the name of the case in the list; notice of having done so must also be given to the opposite party, as, if he proceeds to sign judgment, he would be entitled to the costs of doing so (*b*).]

Kennedy shewed cause against *Otter's* rule.—In *Lester* v. *Lazarus* (*c*), a motion for new trial was placed on the list of those to be moved after the first four days of a term; but owing to the absence of counsel at the time the motion was called on after the four days had elapsed, the case was struck out of the reserved list, leave being, however, given to move it on a subsequent day; on which day a rule for a new trial was granted and served. But no notice of these facts having been given to the other side, execution had issued. But even there, where the cause had been struck out, the Court made a rule absolute to discharge the rule for a new trial, unless the defendant paid the intermediate costs occasioned by the execution, as well

(*a*) See *Angel* v. *Ihler*, 7 Dowl. P. C. 846.

(*b*) *Emblin* v. *Dartnell*, 12 M. & W. 830.

(*c*) 4 Dowl. P. C. 444; reported on another point in 2 C., M., & R. 665; T. & Gr. 129.

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The following memorandum was handed by defendant, a trader, to plaintiff, an auctioneer:—"Memorandum of £107, had by me of S. (plaintiff), being an advance on books sent in for immediate sale by auction:"—signed by the defendant. The books were sold, and an action having been brought by the auctioneer for a balance due to him on the sale, the above memorandum was held to "relate to the sale of goods," and therefore to be admissible in evidence without a stamp, under the exemption in 55 Geo. 3, c. 184, sched. tit. "Agreement."

SOUTHGATE *v.* BOHN.

DEBT.—The declaration was for money lent, work and labour, money paid, and on an account stated. Plea, never indebted. The action was brought to recover 27*l.* 14*s.* 2*d.*, alleged to be due from the defendant, a bookseller, to the plaintiff, an auctioneer, as a balance on an account for commission on the sale of books, money paid for auction duty and expenses of sale, and for money lent. At the trial before *Platt*, B., at the Guildhall sittings in this term, the plaintiff's counsel tendered in evidence the following document:—"Memorandum of one hundred and seven pounds, —— shillings, had by me of Mr. Henry Southgate, being an advance on books sent in for immediate sale by auction, this 8th day of February, 1845. John Bohn." The defendant's counsel objected to it for want of an agreement stamp. The learned Judge directed a verdict for the plaintiff for the whole amount, giving leave to the defendant to move to enter a nonsuit, or to reduce the damages to 9*l.* 10*s.*, or for a new trial.

Lush now moved according to the leave reserved.—This memorandum could not be read in evidence, for want of an agreement stamp. It does not fall within the exemption in 55 Geo. 3, c. 184, schedule, part 1, tit. "Agreement," as a memorandum "made for or relating to the sale of goods;" nor was it a mere acknowledgment of having received a sum of money from the plaintiff: but it was a revocable license to him to sell the defendant's books by auction, and an agreement by the defendant to advance money on account of the books pledged to him. The primary object of it was to obtain a loan of money from the plaintiff, who was to recoup himself from the produce of the sale. *Smith* v.

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the defendant, as in this case.—The learned Baron mentioned *Curry* v. *Edensor* (*a*).

ALDERSON, B.—The agreement which the law implies from the facts admitted by the defendant is, that his books were to be forthwith sold to repay the plaintiff's advance. The case resembles that of an "I. O. U.," which implies the agreement to repay the money from the terms there used.

ROLFE, B., concurred.

Rule refused.

(*a*) 3 T. R. 524.

Nov. 18.

BROWN *v.* THURLOW.

Case. Declaration stated, for that *whereas* the defendant contriving and wickedly intending to injure the plaintiff, to wit, on &c., in a certain discourse in the presence of, &c., spoke and published of and concerning the plaintiff, the false, malicious, and defamatory words following, stating the words, and averring special damage to the plaintiff in his business: —*Held* bad on special demurrer, for charging the grievances to have been committed by the defendant by way of recital only, and not directly or positively.

CASE for slander. Declaration stated, for that whereas the defendant, contriving &c., heretofore, to wit, on &c., in a certain discourse which the defendant then had of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of the Queen, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous, and malicious, and defamatory words following, "Bill Brown, (meaning the plaintiff), you are a sheep-stealer. I can prove you are a sheep-stealer at any day or one time." The declaration then alleged special damage to the plaintiff, by means of the premises, in his trade and business of a cattle dealer.

Special demurrer, assigning for causes, that the defendant is not by the said declaration positively charged with having committed the grievances in the declaration mentioned, but it is therein alleged by way of recital only,

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v. *Reynolds* (*a*), thus stated:—"If a declaration in assault and battery begins with 'quod cum,' it is bad, for want of averment." Though the instances quoted in both Abridgments are in trespass only, the same reasoning applies to other actions, including actions on the case; for though the precedents in those forms of action begin with 'quod cum,' by way of recital, the material part, the grievance, or gravamen of the charge, is invariably alleged in positive terms. Nor is *Ring* v. *Roxbrough* (*b*) to the contrary, where it was held, in assumpsit, that an averment of the promise under a 'whereas' is good on general demurrer, for it is included in the subsequent sentence, which alleges by way of positive affirmation, that the defendant has disregarded his promises, and has not paid the money due (*c*). *Bayley*, B., said, "there is no special cause of demurrer on this ground, and it cannot be matter of substance. But in the common form of a declaration on a bond all the contract is stated under a *whereas*." Lord *Lyndhurst*, C. B.—"It states shortly, whereas defendant became bound, *yet* he did not pay" (*d*). [*Alderson*, B.—This question could only have been raised on special demurrer. We have no doubt of the rule in trespass, or of the general principle of pleading, but if the course of precedents in actions on the case is the other way, we should be careful not to disturb them.] What in this action corresponds to the breach in assumpsit, is the actual charge, or gravamen. From the precedents of declarations in case for keeping mischievous animals, public nuisances, malicious arrests and prosecutions, slander, verbal and written, inticing away apprentices, negligence, escapes, &c. &c., it appears that, though matter purely inducement is laid under the recital quod cum, the grievance is invariably laid in direct terms, *e. g.*, under "yet." It is true, the precedents

(*a*) Andrews, 21.
(*b*) 2 Cr. & J. 418; 2 Tyr. 468.
(*c*) See per Lord *Lyndhurst*, C. B., 2 Tyr. 470.
(*d*) 2 Cr. & J. 418.

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example of this kind of fault the use of "for that *whereas*" in trespass for assault, instead of "*for that*," but adds, "it will be observed, however, that, in trespass on the case, the 'whereas' is unobjectionable, being used only as introductory to some subsequent positive allegation." [*Alderson*, B.—Here is no subsequent positive allegation to which the matter under the "whereas" is an introduction. *Parke*, B.—Does not the same principle apply in all cases where a direct averment is necessary? Here there is no direct allegation that the defendant spoke the words, except in an inverted manner: *Sherland* v. *Eaton* (*a*). "Quod cum" is not direct affirmation. *Ring* v. *Roxbrough* was in assumpsit, following the precedent given in the rules prepared by the judges. *Parke*, B.—The breach in that case contained a direct allegation that, disregarding his promise, he had not paid.] Mr. Baron *Bayley* seemed to think the declaration would be good on special demurrer. [*Rolfe*, B., —There is nothing recondite in the matter. This plaintiff complains, for that *whereas* the defendant spoke the words. What then? Nothing more. In trespass, the mere statement of the grievance shews it to be such; whereas, in case, some introductory matter is required to shew it a grievance.] Trespass lies for the direct act of injury, and case for the consequential damage. [*Parke*, B.—What you complain of must be averred directly, and with certainty. That rule of pleading cannot vary in the different forms of action. Had these words not been actionable in themselves, the damage would have been consequential only. The precedents in case for criminal conversation and seduction are comparatively modern. The old form was in trespass for assaulting and seducing the wife or daughter, per quod consortium or servitium amisit (*b*). The "quod cum" is allowed in case, because in that form of action recitals generally occur. A declaration in case for

(*a*) 2 Bulstrode, 214. (*b*) See Chit. on Pl. 4th ed. 151.

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CLEMENTS *v.* FLIGHT.

Detinue.—Declaration alleged, that plaintiff delivered certain paper writings, purporting to be scrip certificates for shares, to defendant, to be re-delivered, on request, after payment to him of a certain sum, averring that that sum was paid to defendant. Breach, that defendant hath not delivered the paper writings, though requested, but "detains" the same. Plea, that they were deposited with defendant as a pledge and security for £210 advanced by him to plaintiff, and that, on payment of that sum, defendant tendered and offered to deliver up and return them to plaintiff, who then refused to receive them:—*Held*, on demurrer, that this plea was bad, for denying the detention argumentatively, and for amounting to non detinet. The detention complained of was an adverse detention, because the word "detain" in a declaration in detinue means, that defendant withholds the goods, and prevents plaintiff from having possession of them.

The bailment stated in the declaration in detinue, whether it be general or special, is surplusage, and not traversable, the gist of the action being the detainer of plaintiff's goods.

DETINUE.—Declaration stated, that the plaintiff theretofore, to wit, on &c., delivered to the defendant certain papers and paper writings, to wit, among others, 100 papers, purporting to be scrip certificates for shares in the Worcester, Warwick, and Rugby Railway Company, 100 papers, purporting to be scrip certificates for shares in the Sheffield and Macclesfield Railway Company, and 1000 papers, purporting to be letters of allotment of railway shares of great value, to wit, of the value of £1000, to be redelivered by the defendant to the plaintiff when the defendant should be thereunto requested, after the payment to the defendant, by or on account of the plaintiff, of a certain sum of money, to wit, £700; and the plaintiff says, that although afterwards, to wit, on &c., divers sums of money, amounting together to the said sum, to wit, the sum of £700, were paid to the defendant by and for, and on account of, the plaintiff, yet the defendant hath not as yet delivered the said papers and paper writings, or any or either of them, to the plaintiff, although he was, after the said payment, to wit, on &c., requested by the plaintiff so to do, and hath unjustly detained, and still doth unjustly detain, the same from the plaintiff, to the damage, &c.

Plea, as to so much of the declaration as relates to the scrip certificates for shares in the Worcester, Warwick, and Rugby Railway Company, and the said scrip certificates for shares in the Sheffield and Macclesfield Railway Company in the declaration respectively mentioned, that the plaintiff ought not to have or maintain his aforesaid action

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the reasons assigned in the demurrer (*a*); thirdly, that it ought to have been averred tout temps prist; fourthly, that the plea should have been pleaded in bar of the whole action.

Lush, in support of the demurrer.—The essence of the action of detinue is the wrongful withholding of a specific chattel of the plaintiff, without his consent, at the time the writ issued. That is accordingly charged in this declaration, but is not answered by the plea, which only admits a withholding against the will of the plaintiff at some time or other. Non detinet is in the present tense, and the defendant may shew under it that he does not withhold the goods from the plaintiff. [*Parke*, B.—There is a plea of tender in detinue in Brown's Entries, tit. Detinue, 149, pl. 10; and see Brooke's Abridgment, tit. Detinue de biens, fol. 227, pl. 21.] The plea excuses the not bringing the goods into court by reason of their weight, and of the court not being a warehouse. The defendant admits a detention at the time the plea is pleaded. He says, I did and do detain, and do not give up the certificates, because I once tendered them to you, and as by your fault you did not receive them then, I now keep them. [*Pollock*, C. B.—He says, you would not have them when I offered them, and now you never shall. *Rolfe*, B.—Detinet means more than tenet.]

The Court here called on

Hoggins to support the plea.—The defendant's duty, on receiving the certificates, was to keep them with reasonable diligence till the £210 was paid him, and then to offer to return them to the plaintiff. Accordingly,

(*a*) Quære, if the plea was double, and whether the averments did not constitute one single ground of defence or tender. See *Bell* v. *Tucket*, 3 M. & Gr. 785; *Robinson* v. *Rayley*, 1 Burr. 316.

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discharged:" see *Cotton* v. *Clifton* (*a*). All that is in issue is the fact of detention. [*Alderson*, B.—Is not that fact the refusal to deliver goods on request? Here you say you are no longer bound to deliver them. Now detention must be of goods which a defendant is bound to deliver on request. *Rolfe*, B.—Does detainer mean simply keeping possession?—or does it not rather mean keeping possession *from the plaintiff*? (*b*). *Parke*, B.—Non detinet does not put in issue the wrongfulness of the detainer, but merely the fact of keeping by the defendant (*c*). *Alderson*, B.—A pledge to the defendant could not be proved on non detinet, because it would set up a right to the goods. *Pollock*, C. B. —Though the defendant might justify having the goods in possession, since the tender to the plaintiff and refusal by him, there is no plea that, as to the period between that event and the time of suing out the writ, the defendant doth not detain. Had they been burnt within that period, might you not plead that you were ready and willing to deliver them till prevented from doing so by their destruction? *Parke*, B.—You say the defendant was bound, not to deliver the certificates, but to let them remain in his possession, and let the plaintiff take them from it. The plea seems an argumentative denial of the bailment laid in the declaration, and sets up a different duty in the defendant.] The time during which the defendant detained the goods, consists of two periods; the declaration covers the whole time; the defendant excuses the detention down to a certain time only; but that cannot amount to non detinet. Even were the bailment more than mere colour or inducement, and therefore material and traversable, which *Whitehead* v. *Harrison* (*d*) shews it is not, the plea could only be bad as an argumen-

(*a*) Cro. El. 755.

(*b*) See per Lord *Abinger*, in *Mason* v. *Farnell*, 12 M. & W. 679, acc.; also Tyrwhitt on Modern Pleading, 432; but see 12 M. & W. 682, and *Richards* v. *Frankum*, 6 M. & W. 420.

(*c*) See *Richards* v. *Frankum*, 6 M. & W. 420, and Co. Lit. 283.

(*d*) 6 Q. B. 423.

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In all actions of debt, a plea of tender means, "I have paid as far as I could, but you would not receive; I could do no more." The defendant not being bound to be active in re-delivering, it is enough if he prevented the plaintiff from taking possession. The plea in fact says, that the defendant has the certificates in his possession, and that they have not been re-delivered.]

Lush, in reply.—If the word "detain," in the declaration, only means that the defendant "holds" the chattel sued for, adversely to the plaintiff, then, as Mr. Baron *Rolfe* intimates, a man might refuse to take it when offered, and yet bring detinue. In Fitzherbert's Natura Brevium, 138 A, it is laid down, "A writ of detinue lieth, in case where a man delivereth goods or chattels unto another to keep, and afterwards will not deliver them back again; then he shall have an action of detinue of those goods and chattels." This plea is in fact an argumentative non detinet. But non detinet traverses not a past but a present detention, *i.e.*, a detention at the time the writ issued. [*Alderson*, B. —There is no judgment for damages for past detention.] Such damages are the subject of an action of trover, for in detinue a defendant must have possession of the chattel, and power to re-deliver it. In *Isaac* v. *Clark* (*a*), *Haughton*, J., says, "As to the second point, there is no sufficient cause or ground for an action of trover by the plaintiff; it is only found that he did request him to deliver this money, and that he refused to do it; and so much is in every action of detinue, contra dixit *et adhuc contra dicit;* this is the point of the action of detinue, but this is not conversion." [*Alderson*, B.—*Dirks* v. *Richards* (*b*) occurred before *Mason* v. *Farnell*, and if, as stated in the Nisi Prius report, I left it to the jury whether there was

(*a*) 2 Bulst. 308.
(*b*) 1 Carr. & Marsh. 626, was cited. See *S. C.* 4 M. & Gr. 574; 5 Scott, N. R., 534.

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so. We have no doubt, therefore, that the detention complained of is an *adverse* detention. And this is the meaning ascribed to the word in Bulstrode, 308 (cited by Mr. *Lush*) by *Haughton*, J., who says, that request and refusal, "*contradixit et adhuc contradicit*," is the point in an action of detinue, but not in trover, in which conversion is the point, and request and refusal evidence only. We think, therefore, that the plea is bad, as amounting to non detinet. A doubt was raised by the precedents stating a readiness to deliver; Brown's Entries, 149, tit. "Touts temps prist," p. 28: but we think the answer is, that in ancient times pleas were not so often the subject of objection for argumentativeness; and there is no case cited where a plea of readiness to deliver has been held good on demurrer.

In the course of the argument, it was suggested that the plea was bad, as containing an argumentative denial of the special bailment in the declaration. On reference to the late case of *Whitehead* v. *Harrison* (*a*), and the authorities there referred to, and particularly *Gledstane* v. *Hewitt* (*b*), and Brook's Abr. tit. Detinue de biens, pl. 50, it seems that not only the common bailment, but any special bailment laid in a declaration of detinue, is merely surplusage, and not traversable, the gist of the action being the detainer of the plaintiff's goods, which the defendant must answer. The plea, therefore, was not open to this objection; and the omission to assign this cause of special demurrer was proper.

Judgment for the plaintiff.

(*a*) 6 Q. B. 423. (*b*) 1 C. & J. 565; 1 Tyr. 4

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tive traverse or admission, in a particular which, should be direct and certain, and that the plea is an indirect traverse or denial of the note in the second count mentioned being another note, as therein alleged, than that which is stated in the first count, and which requires the defendant to plead thereto as another note to that mentioned in the first count. —Joinder in demurrer.

Pearson, in support of the demurrer to the first count.—A promissory note made payable to the order of the maker himself is not a promise by the maker to pay "any other person, &c.," within 3 & 4 Anne, c. 9, s. 1, and is therefore wholly inoperative. At common law, promissory notes were not legally transferable in England by indorsement; see per Lord *Tenterden*, in *De La Chaumette* v. *Bank of England* (*a*). The object of 3 & 4 Anne, c. 9, was to encourage trade and commerce, by giving to the notes described in it the same effect as to inland bills of exchange, and to enable them to be negotiated in like manner (*b*). By sect. 1, all "notes in writing," that shall be made and signed by any person or persons, body politic or corporate, or by certain specified servants or agents, whereby such person or persons, &c. "doth or shall promise to pay to any other person or persons, or body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be by virtue thereof due and payable to any such person or persons, body politic or corporate, to whom the same is made payable." Nor is this a contract at all, for it does not shew on the face of it in whose favour it is made, *Champion* v. *Plummer* (*c*), and cannot be made valid by mere indorsement; *Cooper* v.

(*a*) 9 B. & Cr. 208. Also cited, Bayley on Bills, p. 1, 2 Bla. C. 467; *Trier* v. *Bridgman*, 2 East, 359. See also 2 Ld. Ray. 1545, cited in *Smith* v. *Kendall*, 6 T. R. 124.

(*b*) See preamble of 3 & 4 Ann. c. 9.

(*c*) 1 New R. 252.

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Nov. 13.

TUCKER *v.* BARNESLEY.

On a rule for striking out a demurrer, under Reg. Gen. Hil. 4 W. 4, r. 2, the Court set it aside and struck out the pleadings connected with it, the defendant to pay plaintiff's costs of preparing for trial and attending to try the cause, and of the application to set aside the demurrer, and take short notice of trial, or judgment to be for plaintiff on the whole record.

ASSUMPSIT on a promissory note, by indorsee against maker, the payee being one Flower. The venue was London. The defendant, being under terms of pleading issuably, rejoining gratis, and taking short notice of trial for the first sittings at which the plaintiff could try, pleaded six pleas, the sixth being, in substance, that the note was made for the accommodation of the payee, Flower, without value, and indorsed by him to the plaintiff in order that he might sue on it in his own name, not for his own benefit, but for that of the payee. The plaintiff replied de injuriâ, added similiters, made up his issue, and delivered it to the defendant's attorney, giving notice thereon of trial for the first sitting in London in the term. On that sitting day the cause stood No. 2 in the paper, and the plaintiff's attorney attended with the witnesses, but was informed, that, just before nine on the night before, notice had been left at his office that the defendant's attorney accepted the issue delivered only as a replication, had struck out the similiters added by the plaintiffs, and at the same time delivered rejoinders to five of the replications, and a special demurrer to the 6th, on the ground that it relied on an agreement between Flower and the plaintiff, which, as the plaintiff was a party to it, and as it lay as much within his knowledge as in that of the defendant, ought to have been specifically denied, and on the ground that a material portion of the plea was in the negative, and that this was improperly put in issue by the replication, which alleged that defendant of his own wrong, and without the causes alleged, neglected to pay the note, and thereby contained a negative answer to a negative.

The cause was called on in its order; but, in consequence of the defendant's proceedings, the judge did not think it

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the frivolous demurrer of a plaintiff from being set aside, as is constantly done.

Gray, in support of the rule.—In *Herbert* v. *Sayer*, the sixth plea rested the defence on the bill being an accommodation bill, sued on by the plaintiff as a mere trustee for the real holder. The replication was de injuriâ, and on special demurrer was held right, the plea being in excuse, and not in discharge. This demurrer, therefore, was frivolous, and prevented the plaintiff from proceeding to trial next day on the other issues. [*Parke*, B.—The general rule is, that if any demurrer is delivered with a "frivolous statement" (*a*) in the margin of the matter of law intended to be argued, "it may be set aside as irregular by the Court or a judge, and leave may be given to sign judgment as for want of a plea." That contemplates the case of a demurrer to a declaration. What would have been the course before that rule, if one of two pleas was replied to, and the other not? Could judgment be signed by the plaintiff on the whole record? Must not the plaintiff have gone on uniformly, and answered the whole plea?] Suppose the defendant had rejoined to every replication except that to the sixth plea, and had left that unanswered? [*Parke*, B.—There, by answering all but one, he would have admitted that one, which would be an answer to the action. *Alderson*, B.—I doubt our authority to make this short termination of the question.] The Court will give the same judgment as if there had been no rejoinder to the sixth replication. That would entitle the plaintiff to judgment on the whole record (*b*). [*Parke*, B.—This demurrer is clearly frivolous; saying what is frivolous is saying nothing. A frivolous demurrer to a replication admits its truth, and places the defendant

(*a*) See cases collected, Jervis's Rules, 4th edit. 105; Tyrwhitt on Modern Pleading, &c. 681, 682.

(*b*) Tidd, 9th edit. 472, 563; *Cumming* v. *Sharland*, 1 East, 411.

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Nov. 2.

BEAZLEY *v.* BAILEY.

An order "peremptory" for time to plead does not preclude the defendant from again applying by summons for further time; and if he take out such further summons, judgment signed for want of a plea after the summons is returnable, is irregular.

IN this case the defendant, on Tuesday, the 28th of July, obtained, by consent, a judge's order for four days' time to plead, marked "peremptory," on the terms of pleading issuably, rejoining gratis, and taking short notice of trial. On Saturday, the 1st of August, he took out a summons for further time to plead, returnable at 11 o'clock on Monday, the 3rd. Shortly after that hour, the plaintiff signed judgment for want of a plea, disregarding the summons. On application to the Lord Chief Baron at chambers, his Lordship ordered the judgment to be set aside, as irregular, with costs.

Lush now moved for a rule nisi to rescind this order.—The meaning of the "peremptory" order for time to plead is, that the party will not apply again for further time. It amounts to an engagement with the plaintiff that he will no longer delay to deliver his pleas. [*Parke*, B.—It is not any undertaking on the part of the defendant at all; it is only a peremptory *order* of the judge, and is nothing more than a strong intimation on his part, that, unless an urgent case be made out, the plaintiff is not to apply for further time. *Alderson*, B.—It means only this, "as at present advised, I do not mean to grant any further time."] In *Gray* v. *Pennell* (*a*), Littledale, J., held that the introduction of the word "peremptory," in a rule for time to declare, precluded the plaintiff from taking out more rules for further time. He said it meant "that the party can take out no more rules for time to do the particular act required; and the party giving the rule may sign judgment when the peremptory rule has expired, if the opposite party has not taken the necessary steps." [*Parke*, B.—That case does

(*a*) 1 Dowl. P. C. 120.

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Nov. 3.

Where a party obtains an order for the postponement of the trial of a cause on payment of costs of the day, he must give notice of taxation of such costs, otherwise the other party may go on to trial.

WALLER *v.* JOY.

LUSH had obtained a rule, calling upon the plaintiff to shew cause why the verdict obtained by him in this action should not be set aside, and why he should not pay the costs of this application. It appeared from the affidavits, that, the cause being in the list for trial at the sittings after last Trinity Term, the defendant obtained a judge's order for postponing the trial, on payment of costs of the day, on the ground of the absence of a material witness. This order was served upon the plaintiff, but no notice of taxation, or appointment to tax the costs, was given; whereupon the plaintiff proceeded to the trial of the cause, and, in the defendant's absence, obtained a verdict.

Humfrey now shewed cause, and contended that, under such circumstances, the plaintiff was at liberty to treat the order as a nullity, and proceed to try the cause.

Lush, contrà, referred to the affidavits, as shewing the defendant's readiness to pay the costs, and contended, that he was not bound to give a notice of or appointment for taxation of them; he might not desire to tax the costs, but might be willing to pay them, on application, without any taxation.

PER CURIAM (*a*).—The plaintiff was quite regular in trying the cause. The defendant had obtained a postponement of the trial merely as a favour, on payment of the costs of the day. It was his business, therefore, to serve the plaintiff with an appointment to tax those costs. The rule may be made absolute, on the terms of the defendant's bringing into court, in a week, the costs of the day, and the costs of this application, otherwise it will be discharged with costs.

Rule accordingly.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

1846.
TRISTON v. BARRINGTON.

hitherto wholly refused, and still doth refuse, to the damage of the said A. B. of —— pounds." If the damages formed part of the cause of action in debt, nunquam indebitatus would be a bad plea; it would be argumentative. [*Parke*, B.—Not so; if the defendant was not indebted, the plaintiff could not have sustained damages. The plea answers that which is the foundation of the damages.] *Henry* v. *Earl* (*a*) is also an authority to shew that a plea of payment in debt, pleaded to the "causes of action in the declaration mentioned," would not be considered as answering the damages.

PARKE, B.—The defendant says, by this plea, that he paid a sum of money in full satisfaction of all the *causes of action* in the declaration mentioned; he does not say, in full satisfaction of the *debt*. The meaning of the plea is, that he paid the money in satisfaction of the *debt and damages* stated in the declaration; there was, therefore, nothing in respect of which the plaintiff was entitled to sign judgment.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(*a*) 8 M. & W. 228.

1846.
HALL v. STORY.

of the debt until it reached the plaintiff's hands, and was read by him. If it had been the case of an invoice, or other document directly relating to the goods, that might have been different. [*Alderson*, B.—Suppose the defendant had stood in the county of Durham, and uttered an admission across the Tees to the plaintiff standing in Yorkshire, would not that be material evidence in Durham?] It is apprehended that it would not.

PARKE, B.—I think there should be no rule. It was held, in *Linley* v. *Bates* (*a*), that the posting of an invoice in the particular county was material evidence in that county. Here the defendant writes and posts, in the county of Durham, a letter containing an admission of the debt. That is quite sufficient evidence to satisfy the plaintiff's undertaking.

ALDERSON, B.—This letter, which was written and posted in the county of Durham, is certainly evidence most material to the issue, for it amounts to a promise by the defendant to pay a part of the debt claimed in the action. If it had related to the whole debt, and not to a part only, it might have been made the entire evidence in the cause. And I think it is material evidence in the county of Durham, where the promise which it contains was made.

ROLFE, B., concurred.

Rule refused (*b*).

(*a*) 2 C. & J. 659.

(*b*) In another case, *Fox* v. *Wilkins*, (moved Nov. 10), which was an action of debt to recover the price of bricklayer's work done by the plaintiff for the defendant at Bristol, the Court held that evidence of a *conversation* in Middlesex, between the defendant and the plaintiff's attorney's clerk, in which the defendant, being shewn the particulars of the plaintiff's claim, stating the measure and value of the work, said the work was properly done, but disputed the accuracy of the measurement,—was sufficient to satisfy the plaintiff's undertaking to give material evidence in Middlesex.

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FOLEY v. BOTFIELD.

that the plaintiff, having the general costs of the cause, was entitled to these costs.

PER CURIAM.—These are certainly not costs in the cause, and as no provision appears to have been made respecting them, at the time when the special case was directed, they were properly disallowed.

Rule refused.

Nov. 5.

KNIGHT v. BARBER.

Scrip in a railway company is not "goods, wares, or merchandise," within the exemption in the Stamp Act, 55 Geo. 3, c. 184, Sched., pt. 3, tit. Agreement.

In the morning of a day, the defendant gave the plaintiff a verbal order for fifty shares in a railway company. In the afternoon of the same day, the defendant signed a memorandum, that he had bought of the plaintiff fifty shares in the company, at £10 a share; which memorandum was handed to the plaintiff:—*Held*, that it required an agreement stamp.

ASSUMPSIT for not accepting and paying for scrip certificates of shares in the Huddersfield, Halifax, and Bradford Railway Company. Plea (inter alia), non assumpsit.

At the trial, before *Cresswell*, J., at the last Liverpool Assizes, a witness was called for the plaintiff, who stated that, on the morning of the 12th of August, 1846, the defendant gave the plaintiff a verbal order for fifty shares in the above Company. On cross-examination, he stated, that, on the afternoon of the same day, the defendant signed the following memorandum, with a view to its being afterwards shewn to the plaintiff, to whom it was handed accordingly:—"Bought of Nathan Knight [the plaintiff] fifty shares in the Huddersfield, Halifax, and Bradford Railway Company, at £10 per share." This memorandum was lost, but the witness stated its contents from memory, and said that it was unstamped. It was thereupon objected for the defendant, that its contents were not admissible in evidence; for that the written paper contained the only legal evidence of the contract, and ought, therefore, to have borne an agreement stamp. The learned Judge was of that opinion, and directed a nonsuit.

Baines now moved for a new trial, on the ground of misdirection. First, there was a complete contract by words

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are things accustomably merchantable in the market. The Stamp Act is to be construed liberally for the subject. It is true that, in *Humble* v. *Mitchell* (*a*), shares in a joint-stock banking company were held not to be within the words "goods, wares, and merchandises," within the 17th section of the Statute of Frauds; but, on the other hand, it has repeatedly been held that they are "goods and chattels" within the meaning of the 72nd section of the Bankrupt Act, 6 Geo. 4, c. 16. So, in *Lawton* v. *Hickman* (*b*), it was held that the price of scrip in a railway company might be recovered under a count for goods and chattels sold and delivered. [*Pollock*, C. B.—"Bona et catalla" includes all personal things that belong to a man.] *Scrip* differs in this respect from *shares*, because shares, after the passing of the act of Parliament, can be transferred only by deed, in the manner pointed out by the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18; whereas scrip may well be considered merchandise, being commonly bought and sold in the market, and transferred by delivery. [*Parke*, B.—Would not a written contract for the sale and delivery of stock on a future day require a stamp?] It is apprehended not. [*Parke*, B.—Scrip in a railway company is a mere equity—a mere right to something which may thereafter exist. It is sold, it is true, among speculating persons, but not as an article of general commerce. The sale of it is merely an assignment of a bargain.] It is commonly merchantable in the market; and what else constitutes merchandise? [*Rolfe*, B.—Lands and houses are commonly sold; can they be considered merchandise? or can foreign bonds be considered merchandise? *Pollock*, C. B.—Is the sale of a pawnbroker's duplicate within the exemption?] It is to be observed, that the words in the 17th section of the Statute of Frauds are not precisely the same as in the Stamp Acts; they are "goods, wares, *and* merchandises;" and the

(*a*) 11 Ad. & E. 205. (*b*) Trin. V. 1846, Q. B.; 4 Railw. Cases, 336.

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morandum was signed, if that memorandum was afterwards made and signed by the defendant, and was intended to contain the terms of the contract, and to be acted upon by the plaintiff, it became, when it was so acted upon, the real contract between the parties. The parol agreement goes for nothing, if it was intended that it should be reduced into writing, and that is afterwards done. But, in truth, this appears to have been a mere preliminary conversation between the parties. They would not transact a sale of so many shares in a railway company without a writing. The writing, therefore, is the real contract. If we are to adopt the definition given by my brother *Erskine*, in *Vaughton* v. *Brine*, that such agreements only required to be stamped as would be evidence against both the contracting parties, this memorandum falls within that definition; though I incline to think that the more correct definition is that which is attributed to me, and I have no doubt correctly, in the case of *Beeching* v. *Westbrook*, namely, that a written instrument, to come within the terms of this clause of the Stamp Act, must have been made with the intention of containing in itself the terms of an agreement between the parties. On that principle, it seems to me that this memorandum, primâ facie, required a stamp. Then the next question is, whether it falls within the exemption, as an agreement relating to the sale of "goods, wares, or merchandise." A judicial construction has already been put upon these contracts in the case of *Humble* v. *Mitchell*, where it was held that they were not within the 17th section of the Statute of Frauds. I think the same construction should prevail here. The exemption was intended to protect bonâ fide mercantile transactions of the sale and purchase of goods; but this is a mere agreement between one speculator and another, whereby the party acquires a right to the allotment of certain shares to be afterwards issued in a particular company. In no sense can the sale of scrip be said to be the sale of goods, wares, or merchandise. I think, therefore, that the ruling

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SLEDDON v. CRUIKSHANK.

lease, and for the sale of the green-house, crops, &c., was all one entire contract; and that, as the defendant had not obtained a valid assignment of the lease, he had not got what he bargained for, and could not be made chargeable with the price of the green-house, which was a part of the freehold, though the plaintiffs might perhaps be entitled to recover the value of the furniture, crops, and plants, which the defendant had taken and used. The learned Judge was of this opinion; and, under his direction, the plaintiffs had a verdict for £19, the value of the furniture, &c.; leave being reserved to them to move to increase the damages to £49, if the Court should think them entitled to the value of the green-house also.

Knowles now moved accordingly.—The plaintiffs are entitled to recover in respect of the green-house; for as, by the terms of the lease, the bankrupt had a right to remove it during the term, the defendant also, who is his licensee, may equally remove it, and so deprive the plaintiffs of it altogether. [*Rolfe*, B.—How can it be the subject of a contract not in writing, if it be part of the freehold? *Parke*, B.—It is not properly *fixtures*, but only a right to detach the erection during the term, which the courts have held may be recovered in such an action (*a*). But here the defendant contracts to buy the green-house, *if* he has an assignment of the lease. He cannot compel that; but if you do not give it him, he has not that which he bargained for. It is an entire contract, that he shall have an assignment of the lease, and a present assignment of the green-house, together with a right to remove it in future. Therefore, unless you can make out a new contract from subsequent circumstances, you cannot recover for the green-house.] The defendant has the enjoyment of it, and may, under this contract, remove it during the term.

(*a*) *Hallen* v. *Runder*, 1 C., M. & R. 266.

1846.

Nov. 10.

The Attorney-General *v.* Bailey.

A person who distils spirit for the purpose of making, by the addition of nitric acid, *sweet spirits of nitre* for sale, is a distiller of spirits within the meaning of the 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise license, and liable to the penalties imposed by s. 39 of that act on persons having any private or concealed still, &c. for making or distilling low wines or spirits.

THIS was an information for penalties under the Excise Acts. The first count was framed upon the stat. 6 Geo. 4, c. 80, s. 39 (*a*), and stated, in substance, that certain officers of excise had discovered upon the premises of the defendant certain private and concealed stills and vessels for making and distilling privately made spirits and low wines. The fourth count was framed upon the 6th and 7th sections (*a*) of the same statute, and charged that the defendant had distilled and manufactured spirits in England, for the distilling whereof a license was required, without having taken out such license. Plea, not guilty.

At the trial, before *Pollock*, C. B., at the sittings in Middlesex after Trinity Term, it appeared in evidence that

(*a*) Sect. 39 enacts, "that if any excise officer shall know, or have cause to suspect, that any private or concealed still, cask, or other vessel, for making or distilling low wines or spirits, or any privately made spirits or low wines, are set up or kept in any house or place, upon oath made by such officer it shall be lawful for the Commissioners of Excise, or a justice of the peace, by warrant to authorise such officer to enter such house or place, and seize such still, &c.; and in case the same shall not be claimed by the true owner, the stills and spirits shall be forfeited, and the proprietor of such private or concealed still shall forfeit, for every place in which such still shall be found, and for every such still, the sum of £200." Sect. 6 enacts, "that from and after the commencement of this act, it shall not be lawful for any person or persons in England to have or keep any still whatever for the purpose of distilling or rectifying or compounding spirits, without having first obtained a license for that purpose, under the provisions of this act, signed by the Commissioners of Excise," &c. And sect. 7 requires a new license to be taken out annually, and enacts, "that if any person shall continue to keep or work, or shall use any still, or shall make or brew any wort or wash, or rectify or compound any spirits contrary hereto, every such person shall in every such case forfeit the sum of £500."

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ATT.-GEN. v. BAILEY.

pounds, namely, "all spirits and all other liquors, which shall be mixed with, or shall have had communicated thereto, any flavour of juniper, mint, peppermint, cloves, aniseed, carraway seeds, or almonds, or any of the oils thereof, or the materials producing the same, used by rectifiers or compounders, or in the manufacture of British compounds, and all juices of fruit, having spirits added thereto:" and if a man keeps a still merely for the bonâ fide purpose of manufacturing any of those compounds, it is submitted that he need not have an excise license as a distiller of spirits. If he *sells* the spirits distilled for such a purpose, there are other enactments subjecting him to penalties. [*Alderson*, B.—Can your ulterior object prevent the necessity of taking out a license for doing that for which by itself you must have had a license,—namely, distilling spirits? If you do not obtain one, the revenue is defrauded, because otherwise you would buy them of a man who had obtained a license.] According to that view, every chemist who distils spirits for the bonâ fide purpose of manufacturing compoumd chemical preparations is liable to the duty. [*Parke*, B.—Yes; a chemist is a distiller, if he chooses to manufacture his own spirits of wine, instead of buying them. If a man keeps a still for the purpose of manufacturing spirits, whether he afterwards uses them to drink, or to make other mixtures or preparations, he uses the still for making and distilling spirits, and comes within the penalties of the act. *Pollock*, C. B.—A man cannot keep a still, and make low wines, without being a distiller.]

PER CURIAM (*a*),

Rule refused.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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or its charter described or set forth; and that the circumstances constituting the alleged duty of the bailiff were not set forth.—The plaintiff demurred also to the fourth plea, stating, in the body of the demurrer and in the margin, that the plea was insufficient, "for the like causes and grounds of objection as had been taken to the third plea." —Joinder in demurrer.

The case was argued in Trinity Term last (*June* 1), by

Crowder, in support of the demurrer.—The questions in this case arise upon the 1st section of the stat. 7 Vict. c. 19, which empowers the judges of certain inferior courts to appoint "a sufficient number of proper and responsible persons to act as bailiffs of the said courts." And it is submitted that these pleas, which allege merely that the grievance was committed after the passing of that act, and that, before and at the time of the commission of the grievance, the defendant had been duly appointed to act as a bailiff in execution of the process of the Tolzey Court at Bristol, are insufficient on several grounds. The 8th section of the act gives protection against actions, &c. to the bailiffs of such courts, only "for anything done in pursuance of their duty as *such* bailiffs;" *i. e.* as the bailiffs appointed by the judges of the court under sect. 1. Now it is consistent with these pleas that the defendant was appointed a bailiff before the passing of the act, and not by the judge under the provisions of the act. Nor is it sufficient to say that he was *duly* appointed; he may have been so, and yet not be entitled to the protection of this act, as not having been appointed under its provisions. *Everard* v. *Paterson* (*a*), and *Rex* v. *Mayor, &c. of Lyme Regis* (*b*), are authorities to shew that the pleas are not in this respect sufficiently certain.

Secondly, the jurisdiction of the inferior court is not properly shewn. There is no statement of the charter by which it was constituted, and non constat that it has been

(*a*) 2 Marsh. 304. (*b*) Dougl. 149.

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compelled to prove; and here it would be enough for the defendant, at the trial, to prove that he was a bailiff de facto, and that the act was done by him as such, after the passing of the statute which gives him the protection. It is a mistake to suppose that the 8th section confines that protection to the bailiffs appointed under the first section; it applies to all actions, &c., brought "against *any* bailiff of any such court, for anything done in pursuance of his duty as such bailiff"—*i. e.* as *a* bailiff. The act was clearly intended to protect all officers who acted in the supposed exercise of their duty, whether informally appointed or not.

Secondly, the defendant was not bound to set out the charter, in order to shew the jurisdiction of the court, being merely an officer of the court, who, as such, has no access to the charter: *Buckley* v. *Thomas* (*a*), *Rogers* v. *Brown* (*b*); Stephen on Pleading, 397.

Thirdly, the duty of the defendant, as bailiff of the court, is sufficiently stated. The protection given to him by this act of Parliament does not amount to a complete defence, but only entitles him to notice of action, to a limitation of the action in point of time, &c., if in fact he have done the act complained of "in pursuance of his duty as such bailiff." That is a defence which may be made up of a great number of minute facts, varying in every case, and it would be impossible to anticipate precisely how they might come out in evidence, and to set them out in detail on the record. A party is never required to set forth his evidence. The nature of the defence is sufficiently stated by the allegation, that the grievance was a thing done by the defendant in pursuance of his duty as bailiff. *Peck* v. *Boyes* is in truth an authority for the defendant; it only shews that such a defence must be specifically pointed to the act complained of. That was an action of debt for money had and received, against the clerk to the pasture-masters of the borough of

(*a*) Plowd. 118. (*b*) Hayes's Irish Exch. Rep. 487

1846.

Nov. 12.

GEORGE CHANTLER and MARIA his Wife *v.* LINDSEY.

To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff is a good plea in *bar*.

CASE for defamatory words spoken by the defendant of the female plaintiff. Plea, that the plaintiff Maria was not, at the said time when, &c., the wife of the plaintiff George, modo et formâ.

Special demurrer, assigning for cause, that the matter in the plea is, if true, matter in abatement of the plaintiff's action, and not in bar thereof. Joinder in demurrer.

In Trinity Term (June 2 and 8),

Paterson argued in support of the demurrer. By analogy to the decisions of the courts in cases of coverture, this plea is matter in abatement, and not in bar of the action. If the right of action would survive to the wife, the plea does not destroy the cause of action. [*Pollock*, C. B. —If he be not the husband, what right has he to join in the action? *Alderson*, B.—Cannot the defendant deny, by a plea in bar, that the plaintiff is the husband, which alone gives him the right to join in the action?] He is merely a nominal plaintiff. In *Dickenson* v. *Davis* (*a*), which was an action of trespass by husband and wife for an assault on the wife, the defendant wanted to prove, under not guilty, that the male plaintiff had a former wife still living; but *Pratt*, C. J., said, "I can never allow it; you might have pleaded this in abatement." In Bac. Abr., Abatement, (G), it is said—"If a suit be brought by A. and B. as baron and feme, when they were not married until the suit defended, the defendant may plead this in abatement." And in Com. Dig., Abatement, (E 6): "In an action by husband and wife, it may be pleaded that she was not covert at the day of the writ purchased;" "or that they were never married." This Court decided, in *Bendix* v. *Wakeman* (*b*), that the plaintiff's coverture cannot be pleaded in

(*a*) 1 Stra. 480. (*b*) 12 M. & W. 97.

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action vested in the wife before marriage, but for conformity the husband was joined as a co-plaintiff. The authorities really amount only to this, that under not guilty in trespass, this matter could not be given in evidence. But it was always necessary to plead such matter specially in an action of trespass. In this case, if the wife died, could the male plaintiff go on with the action? Clearly not. It is a plea by way of *traverse* of a material allegation in the declaration; it is like a traverse of the title of plaintiffs as assignees or executors, when they sue in that character. The plaintiffs must make out their title to sue jointly; they do so, as being married; then the defendant says they have no title to sue jointly, for they are not married. The female plaintiff joins the alleged husband for conformity, and avers the marriage to shew that he is rightly joined for conformity. That averment the defendant has a right to traverse.

Paterson replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action by husband and wife for slander of the wife, the husband being joined for conformity. The defendant pleaded, that the plaintiff Maria was not the wife of the plaintiff George. To this plea there was a demurrer; and the question was, whether in such an action this plea was a good plea in bar, or whether it was matter for a plea in abatement. We think it is a good bar, inasmuch as it shews that the alleged husband, if he be not such in fact, has no right to sue at all. It is not a plea in abatement, giving the wife a better writ; but matter in bar, shewing that he who is in one sense the substantial plaintiff, if he be not in fact the husband, has no right to sue at all. Our judgment will therefore be for the defendant.

Judgment for the defendant.

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Mayor, &c. of SALFORD v. ACKERS.

ing, &c. the town of Salford, there was within the said town a certain street, called Peru-street; that the defendant was the owner of certain land within the said street; that the commissioners appointed under the said act of Parliament caused Peru-street to be paved, drained, &c. The declaration then averred, that the defendant's share of the expenses of such paving, &c., amounted to £217, of which the defendant had notice, and was requested to pay the same; that the inhabitants of Salford were incorporated by the name of the Mayor, Aldermen, and Burgesses of the borough of Salford; and that a local act was passed in the seventh year of her present majesty, under which the aforesaid commissioners, by indenture, transferred to the plaintiffs all the powers, rights, privileges, debts, &c., exercised by them under the said acts of Parliament, including the said causes of action.—Breach, non-payment of the said sum of £217.

To this declaration the defendant demurred generally; the main ground of demurrer being, that the commissioners were not empowered to execute the said works until notice to the owners or occupiers of the adjoining premises had been given, requiring them to execute such works, and that they had neglected or refused to do so for six calendar months after such notice; whereas it did not appear from the declaration that there was any such notice, or neglect, or refusal.—Joinder in demurrer.

In last Trinity Term, (May 27),

Crompton argued in support of the demurrer.—The question in this case is, whether the plaintiffs were not bound to have averred in their declaration *notice* to the defendant, as the owner of the land, to do these acts himself. Such notice is, under the 83rd section, a condition precedent to their doing them, and imposing this tax upon the owner of the land, and it therefore ought to have been averred in the declaration. It will be said on the other side, that because the 83rd section comes by way of *proviso*, the answer of

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the borough, it was not necessary to aver in the declaration that the plaintiff was a burgess. But there the Court applied the right rule; that, although the 53rd section was in form a proviso, it was in truth an exception, not altering the character of the offence, but only stating what particular person was to take advantage of it. [*Alderson*, B.—The principle stated in that case appears to be correct; but I begin to doubt whether we applied it properly. *Pollock*, C. B.—It is difficult to distinguish that case from the present, if it was correctly decided.] In Com. Dig. Pleader, (C. 76), it is laid down, that "the plaintiff, in his declaration, ought to aver every fact, without being informed of which the court cannot judge whether the plaintiff has cause of action." In *Clayton* v. *Kynaston* (*a*), Lord *Holt* thus states the distinction applicable to the present case:—"Where the proviso goes by way of defeasance, it must be pleaded by him that takes advantage of it; but this is not so, but alters the sense of the covenant, by *explaining and tying up* the notice to a particular time, which would not have been understood on the general covenant, by which means it becomes a part of the covenant, so that you must plead it accordingly." So here, the notice required by the 83rd section "explains and ties up" the general authority given in terms by the 82nd.—He cited also *Ughtred's case* (*b*); the judgment of *Holroyd*, J., in *Steel* v. *Smith* (*c*); 2 Hale, P. C. 170, 171; *Vavasour* v. *Ormrod* (*d*); *Newys* v. *Larke* (*e*); *Fulmerston* v. *Steward* (*f*).

Watson, contrà.—The legal distinction is between an *exception* and a *proviso;* and the rule is, that an exception must be negatived by the party who proceeds himself upon the instrument; whereas a proviso must be shewn by the opposite party. Where there is a general provision or

(*a*) 2 Salk. 574.
(*b*) 7 Rep. 9, b.
(*c*) 1 B. & Ald. 94.
(*d*) 6 B. & C. 430.
(*e*) Plowd. 410.
(*f*) Id. 105.

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or he can be taxed. *After* the notice given, but not then, the paving, &c. is to be done by the commissione the manner before mentioned in s. 82. It is a *con* upon the right of action, and no question as between a viso and exception properly arises in the case. There possible case in which the commissioners could act wi having previously given the notice under s. 83.

Cur. adv. vu

The judgment of the Court was now pronounced by

Rolfe, B.—This was an action brought by the new poration of Salford, as having succeeded to all the r and privileges of the commissioners for the paving of borough, who were incorporated by a local act, 11 Ge c. viii.

The action was brought against the defendant as o of certain land in Peru-street, which had been pave order of the commissioners, to recover from him his q of the expense of paving that street. The declaration, reciting that Peru-street was one of the streets in th rough liable to the jurisdiction of the commissioners, that the defendant was owner of lands in that street, also reciting that the commissioners had, in exercise of powers, caused that street to be paved, goes on to aver the proportion of the expenses to be paid by the defen in respect of his lands was a sum of £217. The declar then states the charter incorporating the borough, a subsequent local act, under the provisions of which all rights of the commissioners were transferred to the plain including the right to recover the money due (if any) the defendant, and it then avers non-payment of the ab mentioned sum of £217.

To this declaration the defendant demurred generally the ground that the Paving Act did not, on the facts st

in the declaration, give any right of action to the commissioners, nor, consequently, to the plaintiffs. The plaintiffs relied on the 82nd section of the Paving Act, which enacts, that it shall be lawful for the Commissioners to pave the new streets (and this would certainly include Peru-street) in such manner as to them shall seem meet, and the charges and expenses attending such new pavements shall be paid and reimbursed to the commissioners by the owners or occupiers of the land adjoining the said streets so to be paved, each such owner or occupier paying an equal share thereof, to be ascertained as there mentioned. And the clause then goes on to provide, that it shall be lawful for the commissioners to recover such charges and expenses by action at law in any of the superior courts.

It was on this clause that the plaintiffs relied. The defendant, not disputing that if that clause had stood alone, the action would have been maintainable, insisted that the following clause, s. 83, imposed on the plaintiffs the duty, by way of condition precedent, of first requiring the owner or occupiers to do the work themselves, and that it is only in default of their so doing that the right of the commissioners to do the works and claim reimbursement from the owners arises. Section 83 begins with the words, "Provided always," and then proceeds to enact, "that before the commissioners shall cause the streets to be paved *as aforesaid*, they shall, in the first place, give notice to the owner or occupier of every house, land, or hereditament adjoining the street to be paved, requiring him to pave the same in such manner as the commissioners shall direct. And if any such owner or occupier shall, for six months, neglect to pave pursuant to the notice, then and in such case it shall be lawful for the commissioners, and they are hereby required, to cause the same to be done, and to recover the costs and expenses from such owner or occupier in such manner as herein is mentioned."

On these two clauses taken together, the defendant contends

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that the giving of the notice was a condition precedent, and that the declaration is bad on general demurrer, for not containing an averment that such notice had been given; and we think that his argument is good, and must prevail.

The contention on the other side was, that, inasmuch as the obligation to give the notice to the owner, calling on him to do the work himself, occurs in a separate and subsequent clause, introduced by way of proviso, therefore that the non-compliance with that subsequent enactment was a matter to be set up by the defendant by way of defence, and so that it was not necessary for the plaintiffs to advert to it in their declaration. And it was contended that the principle of those cases applies, in which it has been held that an exception not embodied in the enacting clause, but forming the subject of a distinct proviso, must be pleaded by way of defence by the party relying on it, and need not be stated and negatived by the plaintiffs, whose case rests on the original enactment.

We do not at all question the doctrine of that class of cases, but it appears to us wholly inapplicable to this case. The question here is, taking both clauses together, under what circumstances were the commissioners entitled to maintain an action against the owner for his share of the expense? And it appears to us clear that they were empowered to do so only when they had first given a notice to the owner requiring him to do the work himself. The first of the clauses (the 82nd) does, it is true, authorize the commissioners to bring the action, without imposing any previous condition. But the next clause shews clearly that an opportunity is first to be given to the parties to do the work for themselves, and enacts, that in default of their doing so, then, which certainly means *then only*, it shall be lawful for the commissioners to recover the expenses in such manner as is herein (*i. e.* in the previous clause) mentioned.

This clearly makes the giving the notice a condition precedent, without a compliance with which no right of ac-

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BALMAN v. SHARP.

of the writ of summons, is not situate in the city of York, but is wholly situate in the county of York; and that the said city of York is not situate in, nor does it form any part of, the said county of York, but is a county of itself." *Best* argued, that the defendant was therefore described as being in a place which did not exist, and cited *King* v. *Hopkins* (*a*), where a defendant was described in the writ of summons as of "Wilson-street, Finsbury, in the city of London," and the writ was set aside on an affidavit that Wilson-street was in Middlesex, and not in the city of London.

PER CURIAM (*b*).—It is true the prison called York Castle is not within the city of York; but the affidavit does not precisely negative the existence of a place in the city of York called the Castle. For aught that appears, there may be an inn, or some other place, bearing that name, within the city. The affidavit has not hit the bird in the eye.

Rule refused.

(*a*) 2 Dowl. & L. 637.
(*b*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

Nov. 12.

A defendant was called, in the writ of summons, "W. W. Kilpin." He entered an appearance as "William Wells Kilpin, sued as W. W. Kilpin." In the title of an affidavit in support of a rule for judgment as in case of a nonsuit, he was described as "William Wells Kilpin:"—*Held*, that the affidavit was well intitled.

LOMAX v. KILPIN.

THIS was a rule for judgment as in case of a nonsuit.

Bramwell, on shewing cause, objected to the intitling of the defendant's affidavit. The defendant was called in the writ of summons "W. W. Kilpin," and he had entered an appearance as "William Wells Kilpin, sued as W. W.

Kilpin." The affidavit was intitled "Edward Lomax, plaintiff, *v.* William Wells Kilpin, defendant," not adding "sued as W. W. Kilpin."—He referred to *Sims* v. *Prosser* (*a*), and *Shrimpton* v. *Carter* (*b*).

POLLOCK, C. B.—The real name of the defendant is given; why should there be added a statement of his being sued in another name? Would it not be sufficient on an indictment for perjury so to describe him? It is only for the purpose of more perfectly identifying the cause.

PARKE, B.—We may take the defendant at his word, that he is the real defendant in the cause.

PER CURIAM,

Rule discharged on a peremptory undertaking.

Manisty in support of the rule.

(*a*) 15 M. & W. 151. (*b*) 2 Dowl. P. C. 648.

MOORE *v.* MAGAN.

Nov. 14.

Where, in a writ of capias, and in the copy thereof served on the defendant, it was directed to the sheriffs, instead of the sheriff of Middlesex:—*Held*, that this was an irregularity; that though the Court or a judge might amend the writ, they had no power over the copy; and that the defendant was entitled to his discharge, though the writ was amended, on the ground of the variance from it of the copy.

THE defendant in this case was arrested under a writ of capias, directed to the sheriffs (instead of the sheriff) of Middlesex, a copy whereof was served upon him. He thereupon made an application to *Platt*, B., at chambers, for his discharge, on the ground of this irregularity. The learned Baron refused the application, and made an order that the plaintiff should be at liberty to amend the writ and copy thereof. The *writ* was amended accordingly.

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On a former day in this Term, *Burnie* obtained a rule to shew cause why the order of *Platt*, B., should not be rescinded, and the defendant discharged out of custody.

Godson shewed cause.—First, the insertion of the word "sheriffs," instead of "sheriff," in this writ, is no ground for discharging the defendant out of custody. This is not like the case of a writ of capias when it was the foundation of the action; it is a mere collateral proceeding. Secondly, this being a mere clerical error, the court, or a judge, had power to amend it: *Green* v. *Kettleby* (*a*), *Plock* v. *Pacheco* (*b*), *Bilton* v. *Clapperton* (*c*).

Burnie, contrà.—Even if the judge had power to amend the writ of capias itself, he had no power to order the *copy* of the writ to be amended, for that is in the possession of the defendant, and is out of the power of the Court. *Rennie* v. *Bruce* (*d*) is expressly in point. That was an application to discharge the defendant out of custody on the ground of the copy of the capias being defective; and *Coleridge*, J., refused to amend it, saying, that it had been decided in *Byfield* v. *Street* (*e*), that the Court had no power over the copy. A fresh copy might indeed be served, but that would not remedy the defect in the original service. In *Copley* v. *Medeiros* (*f*), the bailbond was cancelled on the ground of a defect in the copy of the capias. [*Parke*, B.—If the *writ* is to be considered as amended, the defendant will not be in proper custody, unless the *copy* be also amended; and your cases shew that the copy cannot be amended; therefore, he is not lawfully in custody, because he has not been served with a copy of the real writ. *Pollock*, C. B.—There is a case of *Macdonald* v. *Mortlock* (*g*),

(*a*) 6 M. & W. 731.
(*b*) 9 M. & W. 342.
(*c*) Id. 473.
(*d*) 2 Dowl. & L. 963.
(*e*) 10 Bing. 27.
(*f*) 8 Scott, N. R. 172.
(*g*) 2 Dowl. & L. 963; also decided by *Coleridge*, J., a few days after *Rennie* v. *Bruce*.

which is later than any of the cases cited at the bar. There the defendant was described in the capias as "Mortlock," and in the copy as "Mortlake;" and on the authority of ——— v. *Rennalls*, mentioned in a note to *Gould* v. *Logette* (*d*), the copy was amended.] [The learned counsel then went into an argument, on the question whether the defendant was entitled to be discharged on the merits, on which the Court decided against him.]

POLLOCK, C. B.—The rest of the Court are of opinion that the defendant is entitled to his discharge out of custody, on the ground of the defect in the copy of the writ; and the rule will be absolute to set aside my brother *Platt's* order, so far as it relates to the amendment of the copy, but not of the writ; the costs to be paid by the plaintiff, and the defendant undertaking not to bring any action. I have some doubt whether they might not well enough be called *sheriffs* of Middlesex; but the difficulty always is as to what is an equivalent, and it may therefore be, on the whole, better to adhere to strictness of form, in order to save the time of the court; and in this case there is a direct decision upon the point.

PARKE, B.—I think the writ was irregular in this case. The Court has already so decided it, and we ought to abide by that decision. The writ itself, however, may be amended; and the order of my brother *Platt* is, therefore, in that respect, correct. But the statute also requires that a true copy of the writ should be served on the defendant; and therefore, in order to constitute a valid arrest, there must be a regular writ of capias, and a true copy thereof must be delivered to the defendant. In the present case, there is a regular writ, by virtue of the amendment, assuming it to be made; but then there has not been a true copy of that

(*a*) 1 Chit. 659.

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writ served; the defendant is at present, therefore, entitled to his discharge. What may be done hereafter is not now the question.

ALDERSON, B.—I regret that a party should be discharged out of custody on such a ground as this; but as the cases have decided that it is a valid ground of discharge, I submit to their authority.

ROLFE, B. concurred.

Rule absolute accordingly (*a*).

(*a*) See *Nicol* v. *Boyne*, 10 Bing. 339.

Nov. 14.

Service of declaration, in ejectment against a railway company, upon the secretary of the company, is good, by stat. 8 & 9 Vict. c. 16, s. 135.

DOE *d.* BAYFS *v.* ROE.

BOVILL moved for judgment against the casual ejector. It was an ejectment to recover possession of some land which had been taken by the Norfolk Railway Company, and the affidavit stated that the declaration had been served personally upon the Secretary of the Company (not saying where). The question was, whether the 135th section of the Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16, which provides, that "any summons or notice, or any writ, or other proceeding at law or in equity, requiring to be served upon the Company, may be served by the same being left at, or transmitted through the post directed to, the principal office of the Company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the

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refusal of the defendant to pay the amount thereof. The defendant pleaded, first, non assumpsit; fourthly, that the said invoice was not found by C. Kern, nor was the same correct; fifthly, that the defendant might not nor could have heard of the incorrectness of the invoice if the same had been correct; and sixthly, that the defendant had not the reserve customary in such cases. At the trial, before *Pollock*, C. B., at the sittings at Guildhall, after last Hilary Term, the following facts appeared:—

In April, 1843, a Mr. Charles Kern, who was then about to sail for Sydney, in New South Wales, having applied to the plaintiffs for a supply of stationery, which they declined to furnish him with except upon a guarantee, the defendant accordingly, at his request, gave them the following guarantee:—

"London, April 26, 1843.

"Gentlemen,—For the sum of £1 sterling, which we hereby acknowledge to have received, we guarantee the due acceptance and payment of the following two bills of exchange, drawn by Charles Kern to your order on Frederic Mader, Sydney, New South Wales, namely, 160*l.* 5*s.* sterling, dated London, the 8th of April, 1843, at thirty days' sight; 160*l.* 5*s.* 3*d.*, ditto, ditto, 18th, four months' sight, being the amount of your invoice of four cases stationery, &c., C. K. 3*s.* 6*d.*, shipped on board the Persia, Oppenheim captain. * * * As we have not heard from Mr. Kern if your invoice has been found correct, which is the cause of our having delayed forwarding you this letter, we claim *this* reserve as customary under such circumstances."

Upon this guarantee being given, Kern drew in favour of the plaintiffs the two bills of 160*l.* 5*s.* and 160*l.* 5*s.* 3*d.*, and immediately after sailed for Sydney. In June, 1844, the plaintiffs received notice from their agent in Sydney that the bills of exchange had been dishonoured, and required

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could not be that the plaintiffs were to wait until Kern came back to England, unless the defendant heard from him in the meantime as to the correctness of the invoice; nor indeed that they were to wait until he should think fit actually to write. [*Alderson*, B.—The reserve really is as to the correctness of the invoice in fact. The defendant was bound, subject to correction as to the real amount of the goods; and there was evidence of the correctness of the invoice.]

Secondly, a party who guarantees the due acceptance and payment of a bill of exchange, guarantees the payment of both principal and interest, just as the party guaranteed ought to have paid it. But, further, this case is within the very words of the 3 & 4 Will. 4, c. 42, s. 28.

Martin and *Warren*, in support of the rule. — The "reserve" stipulated for in this guarantee is the hearing from Kern himself that the invoice was correct. There was nothing unreasonable in saying, not only shall the invoice be correct, but I will learn from the party guaranteed himself whether it is correct. [*Platt*, B.—Is it to be no security until he hears from Kern? *Alderson*, B.—If your construction be correct, Kern, by not writing, may prevent its being a guarantee. The only thing the defendant wants to know is, whether the invoice is correct; when the jury find that it is, that condition is performed.] Supposing that to be the meaning, there is still a variance, for the declaration goes upon a reserve customary in the trade, not upon a particular stipulated reserve as to the correctness of the invoice. "This reserve," in the guarantee, cannot mean "*the* reserve or time customary under such circumstances." The declaration has obviously been so framed to avoid the necessity of averring that there had been time to hear from Kern as to the correctness of the invoice. The parties evidently thought there was some usage as to a reserve in the Sydney trade.

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POLLOCK, C. B.—In this case leave was reserved to the defendant to move to enter a nonsuit. The question is one of variance, and turns on the meaning of a guarantee given by the defendant for the due acceptance and payment of two bills of exchange by one Kern. The words in the declaration are, "*the* reserve customary under such circumstances," and in the guarantee, "*this* reserve;" and the objection made was, that those expressions, "the reserve customary" and "this reserve," are different expressions, and have a totally different meaning. On looking at the agreement, we think that in substance they really mean the same thing. There was in fact but one reserve intended; and whether you call it *the* reserve or *this* reserve, it signifies precisely the same thing. The rule will therefore be discharged.

Rule discharged.

Nov. 17.

Where a plaintiff sues in person, he may in person appear for the defendant, sec. stat., although that case is not provided for in the forms given in the schedule to the 2nd section of the Uniformity of Process Act, 2 Will. 4, c. 39.

SMITH *v.* WEDDERBURNE.

IN this action the plaintiff had entered an appearance for the defendant according to the statute, in the following form:—

"John Elias Smith, plaintiff, *v.* Charles Webster Wedderburne, defendant.—John Elias Smith, the plaintiff, appears for the defendant, sec. stat. Entered 9th of July, 1843."

Hurlstone now moved for a rule calling upon the plaintiff to shew cause why the appearance so entered should not be set aside, and why the defendant should not be at liberty to enter an appearance.—This is not an appearance authorized by the Uniformity of Process Act (2 Will. 4, c. 39). The 2nd section of that directs, that an appearance shall be in

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a defendant's appearance, or putting in special bail, as the case may be. Then s. 2 means only that the party shall do it according to the forms given in the schedule, in cases to which the forms are applicable; otherwise it would be a repeal of the general provision of sect. 16. There will therefore be no rule.

Rule refused.

Nov. 19.

A writ of ca. sa., issued in the lifetime of the judgment creditor, may be executed after his death.

ELLIS *v.* GRIFFITH.

ON the 22nd of February, 1844, a writ of capias ad satisfaciendum against the defendant in this action issued into Middlesex; which, on the same day, was returned non est inventus, and filed on the 6th of March, 1844; and a testatum ca. sa. was thereupon immediately issued into Carnarvonshire, but was not executed, owing to the difficulty of discovering the defendant's residence. On the then sheriff's going out of office, this writ was transferred by him to his successor. On the 13th of October, 1846, the sheriff issued, on the application of the plaintiff's attorney, his warrant for arresting the defendant on the above writ, and on the 14th he was taken under it. On the 12th of October the plaintiff died. Letters of administration had been taken out to her.

Martin now moved to discharge the defendant out of the custody of the sheriff of Carnarvonshire.—The defendant is entitled to be discharged out of custody, the plaintiff in the action having died before the execution of the writ of ca. sa. There are no doubt decisions with respect to writs of *fieri facias*, that where the writ has been tested in the lifetime of the plaintiff, the sheriff has been allowed to execute it after his death; *Clerk* v. *Withers* (*a*), *Harrison* v. *Bowden* (*b*);

(*a*) 6 Mod. 290; 1 Salk. 322. (*b*) 1 Sid. 20.

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nor is any countenance given to the dictum by the other judges.

Welsby appeared to shew cause in the first instance, but was not called upon.

POLLOCK, C. B.—I think no rule ought to be granted in this case. This is an application to set the defendant at liberty, who has been arrested on a ca. sa. issued before the death of the plaintiff, but not executed until afterwards; and I am of opinion that he is not entitled to his discharge. It appears from the case of *Cleve* v. *Veer*, that, so far back as the reign of Charles I., *Croke*, J., thus laid down the law:—"There is a difference betwixt a judicial writ after judgment to do execution and a writ original; for the writ judicial to make execution shall not abate, nor is abateable by the death of him who sues it; as it is the common course if a capias ad satisfaciendum or fieri facias upon judgment issueth, the sheriff shall execute it although the party who sued it died before the return of the writ: and though the death be before or after the execution, if it be after the teste of the writ, it is well enough; as where a capias ad satisfaciendum is sued, and the party taken before or after the death of him who sued it, and before the day of the return; or if a fieri facias be awarded, and the money levied by the sheriff, and the plaintiff dies before the day of the return of the writ, yet the executor or his administrator shall have the benefit, and is to have the money: and it is no return for the sheriff to say that the plaintiff is dead; and therefore he did not execute it." I believe that ever since that time the administration of justice has proceeded on that principle, and that this dictum of *Croke*, J., has been acted on in hundreds of instances. It is said, that there are dicta somewhere else which may affect the question, and it is suggested also, that perhaps some inconvenience may ensue from keeping this person in custody; but the inconvenience which was pointed

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yet, by the Court, the sheriff may levy the money." The death of the plaintiff therefore makes no difference; and the case is the same, whether the mandate of the writ be to seize the goods or the person of the defendant; for the principle in both seems to be, that a judicial writ, once regularly issued, must go on until it is countermanded. Here the mandate of the writ is to take the person of the defendant, and the duty of the sheriff is to do that at any time after the delivery of the writ to him; and as the writ is, according to the late statute, made returnable on its execution, it may be executed at any time. The sheriff in this case, therefore, was no trespasser, because he strictly obeyed the mandate of the writ. The report of that case of *Thoroughgood* goes on to say—"If the plaintiff makes no executors, nor administrators as yet made, the money shall be brought into Court and there deposited."

ALDERSON, B.—I am of the same opinion. I think it much better to stand on a general rule, which we find laid down so far back as the reign of Charles I., than to attempt, after this lapse of time, to find out the reason for it. The consequence of attempting to find out reasons for such old rules is, that the reason is constantly mistaken for the rule itself, and persons argue on the reason, as if it were the rule. Thus, in the case referred to from Cro. Car., certain reasons are given why a fieri facias should continue in force, notwithstanding the death of the plaintiff; from which Mr. *Martin* seeks to infer, that as those reasons do not apply to a ca. sa., the same rule cannot apply to it. Perhaps, however, the reasons for the practice, although applicable à multo fortiori to the case of a fi. fa., may also be very applicable to a ca. sa.

ROLFE, B.—I am of the same opinion, and only wish to say a few words on what has been said by Mr. *Martin*, that the dictum of *Croke*, J., in *Cleve* v. *Veer*, cannot be taken as

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Seller and Another v. William Jones.

The defendant entered into a bond to the plaintiffs, in the penal sum of £250, which recited, that, whereas R. J. had agreed to become tenant to the plaintiffs of a public-house, and it was stipulated, on the letting, that R. J. should take from the plaintiffs all the ale, spirits, &c. which should be consumed on the premises, and that he should become bound with a surety to pay for all ale, &c., which he should receive from the plaintiffs, to the amount of £50, before he should have a fresh supply from them of the same, and so should continue to do from time to time, so long as he should continue tenant of the plaintiffs; and that, when he should cease to be such tenant, the surety should be liable to the plaintiffs for such sum not exceeding £50, which the said R. J. should or might then owe to the said plaintiffs for ale, &c. supplied by them to him. The condition then was, that, if R. J. should from time to time pay to the plaintiffs for all the ale, &c. which he should from time to time have had from them, to an amount not exceeding £50, before he should have had a fresh supply of the same, and when he should become indebted to them in that sum; and if the said R. J. should pay the plaintiffs all sum and sums of money which he should owe them for ale, &c. not exceeding £50, when he should cease to be their tenant, the bond to be void:—*Held*, that under this bond the surety was not liable for any sum, not exceeding £50, which R. J. might owe the plaintiffs at the end of the tenancy, although he might have had from them a further supply of ale, &c. at a time when he owed them £50 and upwards.

DEBT on bond, in the penal sum of £250. The defendant craved over of the bond and condition, which were set out accordingly. The bond recited, that whereas Rowland Jones had agreed to become tenant to the plaintiffs of a certain dwelling-house, being a public-house, and the furniture let therewith; and whereas it was also stipulated, on the said letting, that the said R. Jones should take from the plaintiffs all the ale, spirits, and wine which should be consumed on the premises, and that he should become bound with a surety to pay for all ale, spirits, and wine which he should receive from the plaintiffs, *to the amount of* £50, *before he should have a fresh supply from them of the same*, and so should continue to do from time to time so long as he should continue tenant of the plaintiffs; and that when he should cease to be such tenant, the surety should be liable to the plaintiffs *for such sum, not exceeding* £50, *which the said R. Jones should or might then owe to the said plaintiffs* for ale, spirits, and wine supplied and sold by them to him. Now the condition of the above-written obligation is such, that if the above-bounden R. Jones shall from time to time pay the said plaintiffs for all the ale, spirits, and wine which he shall from time to time have had from them, to an amount not exceeding £50, before he shall have a fresh supply of the same, and when he shall become indebted to them in that sum, and if he, the said R. Jones, shall and

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and wine, upon the terms of the said condition, to wit, from and after the said last-mentioned time until the time when the said R. Jones ceased to be tenant to the plaintiffs, from time to time continued to supply, and did supply, the said R. Jones with, and the said R. Jones, during the term last aforesaid, from time to time had of and from the plaintiffs divers large quantities of ale, spirits, and wine, to the amount of £200, upon the terms of the condition; concluding to the country. Breaches were suggested in the replication.

At the trial, before the Recorder of Chester, it was proved that Rowland Jones had, since the execution of the bond, been supplied by the plaintiffs with ale and spirits, &c. to the amount in the whole of about £200. He had made payments from time to time on account, but had at several times been allowed to be in arrear to an amount exceeding £50. On the 1st July, 1844, £68 was owing; and at the time of the commencement of this action, the balance due from him was 60*l.* 15*s.* It was contended for the defendant, that, under these circumstances, he was discharged from liability, the true construction of the bond being that the surety should not be liable at any time after the principal should have received a fresh supply, being at the time in arrear to the amount of £50. The learned Recorder reserved the point, and under his direction a verdict was taken for the plaintiffs for £50, with liberty to the defendant to move to enter a nonsuit or a verdict for him.

In Easter Term, *Bovill* obtained a rule nisi accordingly, or to arrest the judgment.

Martin, *Townsend*, and *Egerton* now shewed cause.—The argument for the defendant will be, that because ale and spirits were supplied by the plaintiffs to Rowland Jones after the sum of £50 had become due from him, and before it was paid, the plaintiffs are not entitled to recover against the surety. But the parties never intended so to limit the liability. The true construction of the bond and condition

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if it be due at the end of the tenancy?] Construing it with the other parts of the bond, it means only that the defendant shall, at the end of the tenancy, be a surety for payment for goods supplied to an amount not exceeding £50, *upon the terms of the condition, i. e.* upon the terms of no fresh supply being made after the £50 is due, until it be paid. The recital of the bond shews, that the course of dealing to which the surety agreed was that no fresh credit should be taken when £50 was due. Rowland Jones was "to pay for all ale, spirits, and wine which he should receive from the plaintiffs, to the amount of £50, before he should have a fresh supply from them of the same, *and so should continue to do* to the end of the tenancy; and then, when he ceases to be tenant, the surety is to be liable for such sum, not exceeding £50, which R. Jones might then owe. It is all one stipulation, subject to the same limitation. It is said on the other side, that this is a provision for the benefit of the plaintiffs; but there is nothing in the bond which compels them to make any supply at all. The words, "before he should have a fresh supply," could only be inserted to limit the liability of the surety, for the plaintiffs could always stop the supply at their pleasure.—They referred to *Bonsor* v. *Cox* (*a*), *Whitcher* v. *Hall* (*b*), *Holl* v. *Hadley* (*c*), *Dimmock* v. *Sturla* (*d*), *University of Cambridge* v. *Baldwin* (*e*), and *Evans* v. *Whyte* (*f*).

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The single question is, what is the meaning of the bond and condition; whether it was intended that the surety should not be liable at all, if the plaintiffs should allow the debt of the principal to exceed £50, or whether those terms were introduced for the benefit of the obligees, entitling them to sue for £50 before a fresh supply should be made, and also to recover £50 from the surety at the end

(*a*) 6 Beav. 110.
(*b*) 5 B. & C. 269.
(*c*) 4 Bing. 54.
(*d*) 14 M. & W. 758.
(*e*) 5 M. & W. 580.
(*f*) 5 Bing. 485.

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we are to construe according to the ordinary grammatical meaning of the words, not making any difference by reason of its being the case of a surety. So construing it, I think the defendant's point is not made out. If the meaning of the parties were, that no further supply was to take place on credit after the principal's debt should amount to £50, the plaintiffs would be unable to recover; but it seems to me that that construction is not the correct one, but the contrary; and that the true construction is that which has been stated by the Lord Chief Baron. I do not say the question is not open to doubt, because the instrument is not very accurately worded. The recital is in these terms: [His Lordship read it]. That seems to have been framed on the supposition that there was an obligation on the part of the tenant to take all his ale, &c. from the plaintiffs, and a co-extensive obligation on their part to supply all those articles to him. [His Lordship then read the condition.] The tenant is expressly bound to pay £50 as soon as he becomes indebted to that amount; and when £50 is not paid, the obligation to pay arises on the part of the surety. The other words are intended for the protection of the landlords, by not making it incumbent on them to supply more goods under such circumstances. Then, at the end of the term, when there could be no longer any supply, there is an absolute undertaking to pay £50 if it be then due. These are the words of the defendant, and they must receive a reasonable construction. If the parties had the meaning that is contended for on the part of the defendant, they might have stipulated expressly that the plaintiffs should not supply goods on credit, if the principal should make default in payment of £50.

ALDERSON, B.—I am of the same opinion. It is clear, according to the cases, that general words may be limited by recitals, and made particular. That is the principle; the question is upon its application. Here the general

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made deliverable to Brenchley or his assignee by indorsement, on payment of rent and charges from the 25th of July. Brenchley forthwith indorsed and sent it to the defendant. The defendant kept the warrant for about ten months, and, although repeatedly applied to, to pay the price of and charges on the goods, he did not do so; and he refused also to give back the warrant, saying that he had sent it to his solicitor, and that he intended to defend the action, for he had never ordered the goods; and adding, that they would remain for the present in bond.

Upon these facts, it was contended for the defendant, that there was no evidence of the delivery and acceptance of the goods, sufficient to satisfy the Statute of Frauds. The under-sheriff left the question to the jury, whether the defendant had accepted and received the goods; stating that, to bring the case within the statute, it must be an acceptance with the intention of taking possession as owner. The jury found a verdict for plaintiff, damages 16*l.* 11*s.*

In Easter Term, *Prentice* obtained a rule nisi for a new trial, on the ground of misdirection. In this term (Nov. 3),

Thomas shewed cause, and contended that there had been no misdirection, the proper question having been left to the jury; and that the detention by the defendant for so long a period of the delivery warrant, which constituted the title to the goods, and his declaring that the goods should remain in bond, were circumstances that fully warranted the jury in inferring that he had accepted them. He cited *Seller* v. *Keeves* (*a*) and *Bushel* v. *Wheeler* (*b*).

Prentice, in support of the rule.—There has been no acceptance and receipt of the goods within the 17th section of the Statute of Frauds, for the defendant's acceptance

(*a*) 2 Esp. 598. (*b*) 9 Jurist, 532.

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Bentall v. *Burn* (*a*) is directly in point. It was there held, that a vendee's acceptance of a delivery order of the London Dock Company was not an acceptance of the goods themselves, within the Statute of Frauds.—He also referred to *Zwinger* v. *Samuda* (*b*).

The judgment of the Court (*c*) was now delivered by

PARKE, B.—In this case, which was argued before us, in the absence of the Lord Chief Baron, a few days ago, the only point we wished to consider was, whether there was sufficient evidence of the acceptance and actual receipt of the goods to satisfy the 17th section of the Statute of Frauds. The evidence as to this part of the case was, that, after the defendant had verbally ordered a quantity of Eau de Cologne, and at the price of more than £10, from the plaintiff's agent in London, (the plaintiff residing at Cologne), a case containing the quantity ordered was received by the agent, and warehoused by him with a wharfinger and warehousekeeper, who gave for it a document, dated the 21st of July, which is called a warrant, by which the case was made deliverable to the agent or his assignee, by indorsement, on payment of rent and charges from the 25th of July, and the agent indorsed it to the defendant, and sent it to him. This warrant the defendant kept for some months. He was repeatedly applied to for the charges upon and price of the Eau de Cologne, which he did not pay; nor did he return the warrant when asked for it, but said he had sent it to his solicitor, and meant to defend the action, as he had never ordered the goods; and he further said, the goods would remain at present in bond.

It was contended, on the trial before the under-sheriff, that there was no such evidence of the acceptance and receipt of the goods as to bind the bargain. The under-sheriff left the question of receipt and acceptance to the jury, stating,

(*a*) 3 B. & Cr. 423.
(*b*) 7 Taunt. 265.
(*c*) *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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Nov. 19.

If a notice of dishonour of a bill of exchange be *posted* by the holder in due time, he is not prejudiced if, through mistake or delay of the post-office, it be not *delivered* in due time.

Semble, if the post-mark of a letter be given in evidence, it ought to be proved, either by persons from the post-office, or by persons who are in the habit of receiving letters from that post-office.

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ASSUMPSIT by indorsee against indorser of a bill of exchange, dated 9th January, 1846, drawn by J. Sharp, payable to his order two months after date, indorsed by him to the defendant, by the defendant to one Wiggins, and by Wiggins to the plaintiff. Plea, that the defendant had no due notice of dishonour; and issue thereon. At the trial before *Pollock*, C. B., at the sittings in London after last term, it appeared, that, the bill having become due on the 12th of March, notice of dishonour was sent to the plaintiff on the 13th. A witness called on the part of the plaintiff stated, that on the 14th of March he put into the post-office a letter directed to the defendant, containing notice of dishonour of the bill; but he admitted, on cross-examination, that on a former occasion he had kept a letter in his pocket for a considerable time instead of posting it. The letter in question was called for and produced; it bore a post-office mark which was indistinct, but which the defendant contended was that of the 18th of March. It was urged by the plaintiff's counsel, first, that the post-mark ought, under these circumstances, to be proved by the postmaster, or some person connected with the post-office, whose mark it bore; and further, that the post-mark shewed only the time at which the notice of dishonour was delivered out *from* the post-office to the defendant, whereas the question was, when it was posted by the plaintiff. The Lord Chief Baron, in summing up, stated that he thought it was not necessary that the post-mark should be proved in the manner contended for on the part of the plaintiff; and told the jury, that if they thought the post-mark on the letter was that of the 18th of March, the notice was too late, and the defendant was entitled to the verdict; for that the issue was, whether the defendant received the notice in due time, and if it was not properly dispatched from

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clear misunderstanding; for that, if a letter conveying notice of dishonour of a bill of exchange were put into the post-office in time to be delivered on the proper day in the ordinary course of the business of the office, but from some delay in the office it did not reach its destination until a later period, the tender was not prejudiced thereby: *Dobree* v. *Eastwood* (*a*).

PARKE, B.—This rule must be absolute for a new trial. The jury should have been asked to say on what day the letter was posted, not on what day it was received. Notices of dishonour are generally put into the post; when that is done, although, by some mistake or delay at the post-office, the letter fails to reach its destination in proper time, the party who posted it ought not to be prejudiced; he has done all that was usual and necessary, and he does not guarantee the certainty or correctness of the post-office delivery.

POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

(*a*) 3 C. & P. 250.

Nov. 21.

BARLOW *v.* BROWNE.

The defendant, as the agent of an executor, wrote to a legatee informing him of his legacy and its amount, and stating that he would remit it in any way the legatee might suggest. He transacted the business necessary for the transfer of the legacy, and remitted to the legatee the amount of the legacy, minus a sum deducted for expenses:—*Held*, that the defendant was not liable to the legatee, in an action for money had and received, for the sum so deducted.

DEBT for money had and received. Pleas, 1st, nunquam indebitatus; and 2ndly, a set-off for work and labour, and issue thereon. At the trial, before the Secondary of London, it appeared in evidence, that, by the will of a deceased person of the name of Grantham, the sum of £130

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of the parties entitled to it, was to be applied in re-payment of the funeral expenses of the intestate's widow, which had been paid by the plaintiff, and promised so to apply it; and it was held that the plaintiff was entitled to recover it in an action for money had and received.

PARKE, B.—In that case there was an express promise by the defendant to pay the money over to the plaintiff; here there is not the least pretence to say that the defendant has ever agreed to hold the money for the plaintiff: he is the agent of the executor, not of the plaintiff, to receive the money; nor is he a mere stakeholder. So long as the money is in his hands, it is in the hands of the executor. There is no privity whatever between him and the plaintiff.

POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

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KEARSLEY *v.* COLE.

The plaintiff, a shareholder in a banking company, became a surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition-deed, to which the plaintiff and the banking company were parties, whereby he assigned his property to trustees for the benefit of his creditors; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having been compelled to pay the debt to the banking company:—*Held*, that he was entitled to recover back the amount, in an action for money paid, from the defendant.

ASSUMPSIT for money paid, for interest, and on an account stated. Pleas, non-assumpsit and payment, on which issues were joined.

At the trial, before *Williams*, J., at the last Spring Assizes at Chester, it appeared that the action was brought to recover the sum of £500, as money paid by the plaintiff in discharge of his liability as surety for the defendant, under a guarantee dated 27th of April, 1836, given by the plaintiff to a banking co-partnership, called the "Com-

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plaintiff, being himself a partner in the banking company, could not, by payment of a debt due to himself and his co-partners, raise an implied promise of repayment against his principal. The learned Judge reserved both points for the opinion of the Court, and, under his direction, a verdict was found for the plaintiff for the amount claimed, with liberty to the defendant to move to enter a nonsuit. In last Easter Term,

Martin obtained a rule nisi accordingly; against which, in Trinity Vacation (June 26),

Welsby (the *Attorney-General* with him) shewed cause.—With respect to the latter ground on which this rule was granted, it is plain from the stat. 1 & 2 Vict. c. 96, s. 1, that the plaintiff is not, by reason of his being a shareholder in the banking company, precluded from recovering from the defendant the money he has been called upon to pay as his surety. That statute expressly provides, "that no action or suit (by or against a banking co-partnership) shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom interest may be averred, or who may be in anywise interested or concerned in such actions, being or having been a member of such co-partnership; and that all such actions, suits, and proceedings, shall be conducted and have effect as if the same had been between strangers." And the case of *Ex parte Davidson* (*a*) is an authority to shew that this clause applies not only to claims of the company inter se, but also to transactions between the company and one of its members in other rights.

Secondly, a creditor who executes a deed of composition may lawfully reserve his remedies against sureties for the debtor; and a surety is not discharged, if it be stipulated

(*a*) 1 Mont., Deacon, and De Gex, 648.

in the deed of composition that the remedies against him shall be reserved; especially where, as in the present case, the surety is a consenting party to that stipulation, by himself executing the deed. This is established by numerous decisions. It was expressly so held by Lord *Eldon* in *Ex parte Carstairs* (*a*), and in *Ex parte Glendinning* (*b*). In the latter case he says, "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor; but if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties." And again, "Ever since Mr. Richard Burke's case (*c*), the law has been clearly settled, and it is now perfectly understood that unless the creditor reserve his remedies, he discharges the surety by compounding with the principal; and the reservation must be upon the face of the instrument by which the parties make the compromise." In *Boultbee* v. *Stubbs* (*d*), the same learned Judge propounded the same doctrine, and said it had been held at law as well as in equity. *Ex parte Gifford* (*e*) is to the same effect; and in *Cooper* v. *Smith* (*f*), this Court recognised the authority of those cases. That was an action of assumpsit on a guarantee given to the plaintiff for goods supplied by them to one Green, which provided that the plaintiffs were to have liberty to hold over or renew bills, notes, &c., given by Green, and to grant to Green, and the persons liable on such bills, &c., any indulgence, and to compound with them or him respectively, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant by virtue of

(*a*) Buck's B. C. 560.
(*b*) Id. 517.
(*c*) Cited in *English* v. *Darby*, 2 Bos. & P. 61.
(*d*) 18 Ves. 20.
(*e*) 6 Ves. 805.
(*f*) 4 M. & W. 519.

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the guarantee: and it was held that, under the express terms of this agreement, the security was not discharged by the subsequent release of the principal debtor by a composition deed, without the privity of the defendant, and without notice. That case is stronger than the present, because here the plaintiff, the surety, was a consenting party to the composition deed itself.

Martin and *E. V. Williams*, in support of the rule.—First, where a creditor enters into a deed of composition with his debtor, he loses his remedy against a surety for the debtor, unless it be expressly reserved with the consent of the surety *as such*. Now in this case, although the plaintiff, the surety, executed the deed, he did so merely as a creditor of the defendant in respect of other transactions, and no express consent by him, as surety, to the reserve of remedies against him on the guarantee, appears in the case. There are two grounds upon which the discharge of a surety, by a deed of composition with his principal, is founded; first, that thereby the situation of the surety is altered, and he is placed in a position in which he never contracted to be placed; and secondly, that the continuance of the surety's liability would be a fraud upon the principal, by rendering him liable over to the surety, notwithstanding his release by the creditor: *Ex parte Gifford*, *Ex parte Glendinning*, *Boultbee* v. *Stubbs*, *Nisbet* v. *Smith* (*a*), *Ex parte Wilson* (*b*). These grounds equally apply, although the creditor have made a secret agreement with the debtor that his remedies shall be reserved against the surety. But, secondly, even where a surety, who would otherwise be discharged, assents to a composition deed containing such a reservation, he cannot have recourse over to the principal debtor; for although he agrees to the composition deed, he agrees to it without right of suit against the principal

(*a*) 2 Bro. Ch. C. 579. (*b*) 11 Ves. 412.

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PARKE, B.—This was an action for money paid by the plaintiff for the use of the defendant, which was tried before my late Brother *Williams*, at Chester, at the last Spring Assizes. The plaintiff recovered a verdict for £600 and upwards, since reduced to 507*l.* 13*s.* A rule nisi was granted on a point reserved. The case was fully argued after last Term, by Mr. *Welsby* and the present Mr. Justice *Williams*, and we, who heard the argument, are of opinion that the rule ought to be discharged.

The plaintiff was surety for the defendant to the Commercial Bank of England, by a guarantee of £500. The defendant failed, and a deed of composition was entered into between the creditors of the defendant, including the bank, certain trustees, and the defendant. The deed was executed in August, 1839, and it contains, among other provisions, after an assignment of the defendant's estate and effects to trustees, a covenant on the part of each creditor with the defendant, not to sue him by reason of any debts then owing from him; and if such creditor should do so, that the defendant might plead the indenture as a general release; with a proviso, that, notwithstanding anything therein contained, any creditor who had a lien or security might execute the deed, without prejudice to it, or to the claim of any surety for the defendant. The bank executed the deed, and afterwards called on the plaintiff to pay the amount under his guarantee. He did so, and then sued the defendant in this action for money paid. It appeared that the plaintiff was a shareholder in the bank at the time he gave his guarantee, and since.

On the part of the defendant it was contended, that the plaintiff paid in his own wrong, because he had a good defence to an action by the bank, on two grounds; first, that he was a partner in the banking company, and could not be sued by them on his guarantee; secondly, that he was discharged by the effect of the composition deed. As to the first objection, the statute of the 1 & 2 Vict. c. 96, is an answer, and the statute was acted upon in

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supported by those and the following cases: *Ex parte Glendinning*, *Nichols* v. *Norris*, *Smith* v. *Winter* (*a*), and others. This point must, therefore, be considered as settled. Some remarks have, indeed, been made by Lord *Denman*, in the case of *Nicholson* v. *Revill* (*b*), on the doctrine of Lord *Eldon* in *Ex parte Gifford*, throwing doubt on its correctness, on the supposition that Lord *Eldon* had held that a creditor could *release* one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in *Cheetham* v. *Ward* (*c*), unless the instrument of release could, by reason of the context, be construed to be a covenant not to sue, as it was in the case of *Solly* v. *Forbes* (*d*). But we consider it clear that Lord *Eldon* meant only to apply the doctrine to cases where there was *no release*, but a composition, or giving time, not amounting to a *release*, which is the present case; and with reference to it, the rule laid down by Lord *Eldon* is not impeached by Lord *Denman's* remarks. The only question, then, in this case is, what is the effect of the addition of the consent of the surety? That such a consent would not have the effect of discharging the surety as to the creditor, is clear; on the contrary, it affords an additional reason against the discharge. But the ground on which it is alleged to affect the plaintiff's case is, that it puts the surety in the same situation as if he had applied to a court of equity to sue in the place of the creditor, and had been permitted to use his name, upon payment of the debt into court; in which case it is said he would not have been allowed afterwards to recover over against the principal, as suggested in the note, said to have been written by Mr. Justice *Holroyd*, to *Lewis* v. *Jones*. Supposing that a court of equity would so deal with a case before it, on which we can offer no opinion, it is enough to say that we do not think that such an effect can be attributed to the act of

(*a*) 4 M. & W. 554.
(*b*) 4 Ad. & E. 675.
(*c*) 1 Bos. & P. 630.
(*d*) 2 Brod. & B. 38.

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EDDISON v. PIGRAM.

Lush, contrà.—The plea cannot be treated as a nullity; it is merely demurrable. In *Hughes* v. *Pool* (*a*), where the plaintiff signed judgment on the ground that the defendant (who was under terms to plead issuably) had not pleaded to the count on the account stated, the Court set aside the judgment on terms. Here the plea, professing to answer the whole declaration, is in reality an answer to part only. That renders it bad on special demurrer, but does not entitle the plaintiff to sign judgment: *Putney* v. *Swann* (*b*), *Cowper* v. *Jones* (*c*). [*Parke*, B.—Suppose the converse of this case, that the defendant had pleaded non assumpsit to the whole declaration, that would only be ground of demurrer.]

Secondly, the plaintiff cannot amend his judgment, for he cannot sign a *partial* judgment: *Wood* v. *Farr* (*d*), *Worley* v. *Harrison* (*e*).

Temple, in support of his rule, cited *Fraser* v. *Newton* (*f*), in which, under similar circumstances, it was held that the plaintiff's course was to sign judgment on the count on the bill of exchange, and enter a nolle prosequi on the other counts of the declaration. He referred also to *Sewell* v. *Dale* (*g*).

Lush suggested that the cases of *Wood* v. *Farr*, and *Worley* v. *Harrison*, were not cited in *Fraser* v. *Newton*.

POLLOCK, C. B.—Without going through all the cases that have been cited, it is sufficient to say that we think the rule for setting aside the judgment must be made absolute. In substance this is the case of a plea professing to

(*a*) 6 Man. & G. 271.
(*b*) 2 M. & W. 72.
(*c*) 4 Dowl. P. C. 591.
(*d*) 5 Bing. N. C. 247.
(*e*) 3 Ad. & E. 669.
(*f*) 8 Dowl. P. C. 773.
(*g*) Id. 309.

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and costs as between attorney and client. The entry or incipitur of the judgment was in the following form:—

"In the Exchequer of Pleas. "Judgment on postea for £1000.

"The 6th of February, A. D. 1846.

"Lancashire, (to wit.) William Edward Newton, the plaintiff in this suit, complains of the Grand Junction Railway Company, the defendants in this suit, who have been summoned to answer the plaintiff in an action on the case. For that whereas &c.

"Judgment signed 6th February, 1846.

"Costs £1322 13*s*.

"WALKER."

The words "Judgment signed 6th February, 1846; costs £——" were written by the Clerk of the Judgments, when the judgment was signed, on the 6th February; the amount of the costs was filled in by the Master on the 13th of May, after the taxation. The entry in the judgment-book, at the Exchequer of Pleas Office, of the signing of the judgment, was as follows:—

"6th February, 1846.

"Lancashire—Verdict / Case { William Edw. Newton *against* The Grand Junction Railway Company. } Baxendale & Co.

"Damages £1000.

"Costs £1322 13*s*."

The plaintiff, in addition to the damages and costs, claimed the sum of 16*l*. 7*s*., for interest at four per cent. from the 6th of February to the 13th of May. The defendants refused to pay this sum, and a fieri facias issued against them, whereupon they applied for and obtained the present rule.

In Trinity Term (June 10),

Martin shewed cause.—The judgment was signed in this

case on the 6th of February, when the entry of the incipitur was made by the officer, and that is the date from which interest is payable under the 1 & 2 Vict. c. 110, s. 17, which enacts, that every judgment debt shall carry interest at the rate of four per cent. per annum "*from the time of entering up the judgment.*" At common law, all judgments related to the first day of the term in or after which the judgment was given, and the actual day of signing the judgment was immaterial. But by the 13th and 14th sections of the Statute of Frauds, the officer was directed to enter on the margent of the roll the day of signing judgment, which is, as against bonâ fide purchasers, to be considered the date of the judgment. And now, by the general rule of Hilary Term, 4 Will. 4, s. 3, it is directed that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, *when signed*, and shall not have relation to any other day. Then came the stat. 1 & 2 Vict. c. 110, s. 17, giving interest from the time of *entering up* the judgment. Now *entering up* and *signing* judgment are synonymous. [*Pollock*, C. B.—How can interest run before the party knows what he has to pay?] The delay is the act of the Court, and ought not to prejudice the suitor, who was entitled to his debt and costs from the earlier date. The loss occasioned by the delay ought to fall on the party who is in the wrong. [*Alderson*, B.—I have no doubt as to that part of the rule which seeks to alter the date of the judgment; that would alter the date from which the lands would be bound. Then, as to the interest, there is an uncertain amount, which is in the wrong pocket, and is there bearing interest; I see no injustice in saying, that as soon as it is reduced to certainty, that interest should be paid. Whatever be the sum, it is fructifying in the wrong pocket.] The case of *Fisher* v. *Dudding* (*a*) is an express

(*a*) 3 Scott, N. R. 516; 9 Dowl. P. C. 872.

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authority upon this point for the plaintiff. *Peirce* v. *Derry* (*d*) will be relied upon for the defendant. That case decided, that the entry of judgment is not *final* until the taxation of costs. The facts were, that the plaintiff, having obtained a verdict in July 1841, entered up judgment on the postea on the 13th of December, 1841, dating the entry as of that day. On the 1st of February, 1842, he taxed his costs, and entered up judgment on the roll as of the 13th of December, 1841. Between the 13th of December, 1841, and the 1st of February, 1842, the defendant died. His executors brought a writ of error, and the Court, at their instance, ordered the date of the judgment to be altered from the 13th of December to the 1st of February following; holding, as it seems, that for the purpose of fixing executors, the interest should run only from the time of the taxation of costs. But the legislature has expressly declared that the losing party shall pay interest from the time when judgment is entered up; that is, from the time when the judgment is obtained, and the entry of it is made by the proper officer; and it matters not that the *amount* upon which the interest is to be calculated is not ascertained until afterwards.

Jervis, in support of the rule.—Judgment cannot be said, for this purpose, to have been entered up, until the taxation of costs has been completed, and the Master's allocatur given for the amount ascertained thereby. In effect, the Court takes time to say what the costs shall be, instead of giving them in a lumping sum, as they used to do. The words used in the Statute of Frauds are, "signing judgment;" but in the statute of Victoria, "*entering up* judgment." In the Common Pleas, the incipitur is dated *after* the taxation of costs: in the Queen's Bench the incipitur is contemporaneous with the taxation, and the judgment

(*a*) 4 Q. B. 635.

paper is not given out to the party until he brings back the postea and allocatur. *Fisher* v. *Dudding* is not precisely in point; there was an amended taxation, and the question was, whether the costs, as increased upon the review of the taxation, could have reference to the original taxation, which clearly was before the signing of judgment, inasmuch as in that court the allocatur precedes the incipitur. The case of *Peirce* v. *Derry* was fully argued and considered, and is a direct authority for the defendants. If judgment be held for this purpose to be entered up before the costs are taxed, the party liable to pay costs can never pay them, and thereby save the interest. *Butler* v. *Bulkeley* (*a*) also shews that the judgment is not final on the officer's marking the record, but on his completing the taxation of costs. The plaintiff here did not waive his costs, and therefore was not in a condition to enter up his judgment until the 13th of May.—He cited Archb. Pract. 490 (6th ed.), *Blackburn* v. *Kymer* (*b*), and *Helie* v. *Baker* (*c*).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question in this case was, from what time interest is to be calculated, in reference to the signing of judgment; the statute giving interest "from the time of entering up the judgment." The question is, whether interest is to run from the first act done for that purpose, or from the time of perfecting the judgment, after the taxation of costs. The case of *Fisher* v. *Dudding*, decided by the whole Court of Common Pleas, is directly in point: the question was precisely the same as in the present case, and there is no difference in point of fact between

(*a*) 1 Bing. 233; 8 Moore, 104. (*b*) 5 Taunt. 652.
(*c*) 1 Sid. 385.

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them. All the Court are of opinion that interest is to be calculated from the time of the entry of the incipitur. We think, not only that we are bound by that decision of the Court of Common Pleas, but that it lays down the proper rule. The giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it. It is in truth a compensation for delay. If loss accrues from that, it should rather fall on the defendants, who are in the wrong, than on the plaintiff. At any rate, we are quite satisfied with the judgment of the Court of Common Pleas.

Rule discharged, with costs.

Nov. 25.

Where, in an action of debt for work and labour, the plaintiff obtained a verdict, but the Court granted a new trial, on the ground that he ought to have declared specially, and he thereupon, without discontinuing that action, brought another for the same cause in assumpsit, declaring specially; the Court stayed the proceedings in the latter action until the former was dis-

HAIGH *v.* PARIS.

THE plaintiff in this case had sued the defendant in an action of debt, for work and labour, but, on the trial before the undersheriff of Middlesex, failed to prove that any work had actually been done by him; and on the discussion of a rule upon leave reserved by the undersheriff to enter a nonsuit, this Court made the rule absolute for a new trial, holding that the plaintiff ought to have declared specially. The plaintiff, however, instead of taking the cause down again for trial, commenced a fresh action in formâ pauperis in assumpsit, declaring on a special contract. The defendant thereupon obtained a rule, calling upon the plaintiff to shew cause why the proceedings i this action should not be stayed until the former actic for the same claim should be disposed of.

Thomas shewed cause.—There is no ground for rule. The plaintiff has brought a fresh suit, not in deb

work and labour, but in assumpsit, upon a special contract. That is an entirely different cause of action. The defendant might, if he thought fit, have taken down the first action by proviso.

Greenwood, contrà.—These actions are, as it is admitted, both founded upon the same subject-matter; and the mere circumstance of the form of action being varied can make no difference. The plaintiff ought to have discontinued the first action before he brought a new one, and upon that discontinuance the defendant would have had his costs. He cited Lush's Practice, 796; *Weston* v. *Withers* (*a*); and *Doe* d. *Church* v. *Barclay* (*b*).

ROLFE, B. (*c*).—This rule must be absolute, to stay the proceedings in the second action until the first has been discontinued or otherwise determined. In *Thrustout* d. *Park* v. *Troublesome* (*d*), the Court of Queen's Bench stayed proceedings in an ejectment brought in that court, until the plaintiff discontinued another action brought previously on the same title, and for the same lands, in the Common Pleas. Here it is not denied that both the actions have been in fact brought for the same subject-matter.

Rule absolute.

(*a*) 2 T. R. 511.
(*b*) 15 East, 233.
(*c*) Sitting alone.
(*d*) Andr. 297.

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Nov. 24.

DRURY *v.* MACAULAY.

The following instrument was held not to be a promissory note: "*Drury* v. *Vaughan*. In consideration of W. Drury not taking any further proceedings in the above actions, I hereby undertake with the said W. Drury that I will pay him 3*l.* 5*s.* every quarter of a year from this day, until the whole of the principal money now due from Messrs. J. & T. Vaughan to Mr. Drury, 26*l.* 1*s.*, with lawful interest, be paid and satisfied; the first of such quarterly payments to become due on the 30th of October next. It is understood that this undertaking is not to be a release or discharge of the note signed by Messrs. Vaughan to the said W. Drury, on &c., but as on additional security for the above-mentioned amount, now due on such note, with the interest."

ASSUMPSIT.—The declaration stated, that heretofore, to wit, on &c., one J. Vaughan and one T. Vaughan made their promissory note in writing, and thereby jointly and severally promised to pay to the plaintiff on demand 43*l.* 17*s.* 6*d.*, with interest; that the plaintiff afterwards, to wit, &c. &c., commenced two several actions against the said J. Vaughan and T. Vaughan, for the recovery of 26*l.* 1*s.*, the balance due from them to the plaintiff of the said sum of 43*l.* 17*s.* 6*d.* in the said promissory note mentioned; and that, in consideration of the premises, and that the plaintiff, at the request of the defendant, would forbear any further proceedings in the said actions, the defendant, to wit, on the 30th day of July, 1842, promised to pay the plaintiff the sum of 3*l.* 5*s.* per quarter of a year from the said 30th day of July, 1842, until the whole of the said sum of 26*l.* 1*s.*, with interest, should be fully paid and satisfied; the first of such quarterly payments to become due on the 30th day of October then next: it being at the time of the making of the said promise agreed by the plaintiff and the defendant, that the said promise of the defendant was not to be a release or discharge of the said promissory note, but to be an additional security to the plaintiff for the said sum of 26*l.* 1*s.*, and interest. The declaration then averred, that the plaintiff did forbear any further proceedings in the said actions, and alleged as a breach the non-payment by the defendant of the 26*l.* 1*s.*, or any part thereof. There was also a count on an account stated.

Plea, non assumpsit.

At the trial, before the under-sheriff of Shropshire, the plaintiff put in evidence the following document, signed by the defendant, and stamped with an agreement stamp:—

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promissory note: "On demand I promise to pay to W. Shenton £50, in consideration of foregoing and forbearing an action in the Queen's Bench for damages ascertained by consent to amount to that sum, by reason of the injury sustained by his wife in respect of my liability for non-repair of a footway." The ground of that decision was, that the instrument appeared to be made on an executed, and not an executory, consideration; and the same reason applies here.

Phipson, contrà, was stopped by the Court.

PARKE, B.—This rule must be absolute. The instrument in question is, by the express terms of it, to be deemed an additional security for the balance due upon the note. No money is secured by it which is payable at all events, and consequently it is not a promissory note.

ALDERSON, B.—This document is not a promissory note. It is not certain that any money will be paid by virtue of it. If the plaintiff does not forbear proceedings against the Vaughans, none will be paid.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

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VACATION SITTINGS AFTER MICHAELMAS TERM.

WOODS v. DURRANT.

Nov. 27.

Trespass for breaking and entering plaintiff's dwelling-house, locking the doors, and expelling the plaintiff. Plea, justifying all the trespasses except the expulsion under a distress for rent, alleging that defendant kept and impounded it in the dwelling-house, &c., and in order safely to impound and keep it, necessarily locked and fastened the doors of the dwelling-house, and afterwards caused the goods to be duly appraised and duly sold in satisfaction of the rent and costs of distress and sale. Replication, that defendant broke &c. the house, locked the doors, and seized, took, and converted the goods of his own wrong and for *another and different purpose* than that mentioned in the plea, *i. e.* for the purpose of ejecting &c. the plaintiff from the possession of the dwelling-house, concluding with a verification. Demurrer. *Semble*, that the replication was bad for not traversing defendant's entry for the purpose of distraining, and concluding to the country, instead of raising an immaterial issue on the intention of the defendant in entering.

Semble, also, that the plea need not aver notice of the distress, with the cause of the taking, to have been given according to 2 Will. & Mary, sess. 1, c. 5, s. 1, and that the plea, having perfectly answered the seizure, was not rendered bad in substance by going on unnecessarily to answer matters of mere aggravation laid in the declaration, viz. the conversion of plaintiff's goods.

Held, that the plea should have shewn that the house, or that part of it of which the doors were locked, was the most fit and convenient place for securing the distress, or the tenant might be improperly kept out of possession.

TRESPASS for breaking and entering the plaintiff's dwelling-house, locking, fastening, and bolting the doors of the said dwelling-house, ejecting, expelling, putting out, and removing the plaintiff from the possession, use, occupation, and enjoyment thereof, and keeping him so ejected, &c. till the commencement of the suit, and during that time, to wit, on &c., seizing and taking certain specified goods of the plaintiff, and carrying away and converting and disposing thereof to defendant's own use; by means of which premises the plaintiff was deprived of the use and benefit of his dwelling-house, and was prevented from carrying on his trade and business of a brewer therein.

Second plea (*a*), (except as to ejecting, expelling, &c. the plaintiff from the possession &c., and keeping and continuing him so expelled &c., as in the declaration alleged), that the plaintiff, before and at the times when &c., held, occupied, &c., and enjoyed the said dwelling-house in

(*a*) The other pleas were, first, Not guilty; thirdly, To the breaking and entering, that the dwelling-house was not plaintiff's; fourthly, To same, liberum tenementum; fifthly, to seizing and taking the goods, &c., that they were not plaintiff's; sixthly, leave and license.

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which &c., as tenant thereof to the defendant (*a*), by virtue of a certain demise thereof made by the defendant to the plaintiff for the term of one year from the 29th of September, 1840, and then on from year to year until the plaintiff or defendant should give to or leave for the other of them six months' notice in writing to quit, at the yearly rent of £21, payable quarterly in each year of such tenancy. Averment, that, after the making of the demise, and during the continuance of the tenancy, and before the said time when &c., to wit, on &c., £21 of the rent aforesaid, for one year of the tenancy ending on the 25th of March, 1845, became and was due and in arrear from plaintiff to defendant; "whereupon the defendant afterwards, and during the continuance of the said tenancy, to wit, on &c., entered into the said dwelling-house in which &c., the outer door of the same being open, to distrain for the said arrears of rent, and did then and there distrain the goods and chattels in the declaration mentioned, then being in the said dwelling-house in which &c., and then being subject to such distress, as and for a distress for the said arrears of rent, and kept and impounded the same (*b*) *in and upon the said dwelling-house under the said distress for the space of five days;* and in order safely to impound and keep the said distress so impounded as aforesaid, then necessarily locked, fastened, and bolted the doors of the said dwelling-house in the declaration mentioned, and within which doors the said distress was so impounded as aforesaid; and, at the expiration of five days from such distress (*c*), the defendant, at the request and with the license

(*a*) See *Drew* v. *Avery*, 13 M. & W. 399.

(*b*) The plea, as afterwards amended, had, in lieu of the words in italics the following: "as such distress in and upon such part of the said dwelling-house as was most fit and convenient for the impounding and securing the said distress, according to the form of the statute in such case made and provided, and the true intent and meaning thereof, for the space of five days then next following."

(*c*) The amended plea here added, "to wit, on the —— day of ——."

and permission of the plaintiff (a), continued to keep the said goods so impounded in the said dwelling-house in which &c., for a long space of time next following the expiration of the said five days, to wit, twenty-one days, and during the last-mentioned period, to wit, on &c., the defendant caused the said goods to be duly appraised, and there duly sold the same by virtue of the said distress, according to the form of the statute in such case made and provided, in satisfaction of the said arrears of rent and the costs of the said distress and sale; which are the alleged trespasses whereof the plaintiff hath above complained, except the alleged trespasses in the introductory part of this plea excepted.—Verification.

Replication, that the defendant, at the said several times when &c., broke and entered the said dwelling-house in which &c., and locked &c. the said doors, and seized, took, carried, and converted the said goods &c., of his own wrong, and for another and different purpose than the purpose in the plea mentioned; that is to say, for the purpose of ejecting, expelling, &c. the plaintiff from the possession &c. of the said dwelling-house in which &c.—Verification.

Special demurrer, for the following, among other causes: that the replication concludes with a verification, and not to the country; that a material issue cannot be taken on it; that it does not confess and avoid, and is an informal traverse de injuriâ, not admissible by the plea; that it would necessarily lead to a departure; that it is an informal and insufficient new assignment.—Joinder in demurrer.

J. J. Johnson, for the defendant, in support of the demurrer.—This replication is in an unusual form. If taken as a replication de injuriâ, it is bad within two of the resolutions in *Crogate's case* (b): first, because the plea claims

(a) The amended plea here added, "by him then made and given to the defendant in that behalf."

(b) 8 Rep. 67 b.

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an interest in the locus in quo; and secondly, because it alleges an authority derived immediately from the plaintiff. [*Parke*, B.—It is not a replication de injuriâ, traversing the cause, but a replication alleging that the defendant entered for a different cause, so as to raise the question in *Lucas* v. *Nockells* (*a*). Absque tali causâ, or absque residuo causæ, is the essence of the replication (*b*). De injuriâ is nothing.] If so, the replication should have expressly traversed the affirmative allegation in the plea, that the defendant entered for the cause assigned, viz. to distrain, and should have concluded to the country. Here there is no "absque tali causâ;" but the plaintiff, in effect, new assigns, and concludes with a verification. [*Parke*, B.—It is not a new assignment.] It is not in form a new assignment, but it is in the nature of one, and presents an immaterial issue to the defendant. In *Lucas* v. *Nockells* (*a*), on a replication de injuriâ absque residuo causæ, the question of fact was left to the jury, whether the defendants (being consignees of the goods as well as judgment creditors) bonâ fide took them under their fi. fa., or resorted to it merely to defeat the plaintiff's claim for freight, which would have arisen had the defendants accepted the goods (as there was evidence they had done) under the bill of lading. The question there was one of fact, whether the defendants ever really entered under the fi. fa. at all. On these pleadings, however, no such issue could have arisen. The plaintiff, in his replication, refers to the same trespasses and the same days as those covered by the plea, and none other. He does not deny the special matter of justification, but goes on to allege some *ulterior* purpose of the defendants. That raises the mere question of *motive*, which is utterly immaterial, if the primary cause of justification exist. It may be tested by the case of a new assignment in trespass. The plaintiff there does not

(*a*) 4 Bing. 729; 1 M. & P. 783, S. C.; 10 Bing. 157; 3 M. & Sc. 650.

(*b*) See Com. Dig., tit. "Pleader" (F 24).

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for one thing and avow for another: *Butler & Baker's case* (*a*); *De Groenvelt* v. *Burwell* (*b*); *Crowther* v. *Ramsbottom* (*c*); *Ex parte Williams* (*d*); *Oakes* v. *Wood* (*e*). So, a master may dismiss a servant ostensibly for one cause, and yet justify for another, if known to him at the time, without his motive being called into question: *Ridgway* v. *Hungerford Market Company* (*f*); *Cussons* v. *Skinner* (*g*); *Mercer* v. *Whall* (*h*). So, in actions for malicious prosecution, the defendant will be protected by having reasonable and probable cause for his act, however inveterate the malice which prompted it. [He was then stopped by the Court.]

Bramwell, contrà, for the plaintiff.—First, whether the motive for exercising the right of distress can be questioned or not, still if the defendant's act in distraining was done, not for the purpose of levying an arrear of rent, but in order to expel the tenant, it cannot be justified. [*Parke*, B.—Should not the replication have traversed the defendant's entry for the purpose of distraining, and concluded to the country? That entry is not at present denied. Nor does the plaintiff new assign; what he says is, that the defendant entered for an ulterior purpose. This intention being immaterial, *Lucas* v. *Nockells* does not preclude the point being taken; *Oakes* v. *Wood* (*e*). The entry admitted to have been made might have been for the rent of other and different premises.] Secondly, the plea is bad in substance, for not shewing that notice of the distress, with the cause of such taking, was left at some notorious part of the premises, according to 2 W. & M. sess. 1, c. 5, s. 1. The asportavit, being part of the trespass complained of, is ad-

(*a*) 3 Rep. 25.
(*b*) 1 Lord Raym. 454, 466; 12 Mod. 386; Comyns, R. 76.
(*c*) 7 Term Rep. 654.
(*d*) 5 Madd. 1.
(*e*) 2 M. & W. 791.
(*f*) 3 Ad. & E. 171.
(*g*) 11 M. & W. 161.
(*h*) 5 Q. B. 447, see 6 Q. B. 712, 714; *Baillie* v. *Kell*, 4 New Cas. 638.

mitted. [*Parke*, B.—The gist of the matter complained of in the declaration is the original seizure, and before any new assignment; the rest is surplusage. The declaration would be good if the allegation of conversion were struck out. The plea need not have answered that allegation, but justifies all the rest perfectly. Then the question is, whether the assuming to answer matter of aggravation which need not have been averred, and answering it imperfectly, so that the plea, though perfect as to the material averments in the declaration, is not complete in omnibus, makes it bad in substance, and without special demurrer (*a*). The matter to which the superfluous answer contained in the plea is directed, was not new, so as to be the subject of new assignment, being matter of misuser subsequent to the original taking, which should have been specially replied, as constituting a trespass ab initio (*b*). So that, in the plea, the "leap has been before coming to the stile" (*c*). *Alderson*, B.—The wrongfully taking possession of the plaintiff's goods, and preventing him from using them, would be a conversion to the defendant's use, without taking them away (*d*). The plea justifies everything except the expulsion, that is, the breaking and entering, the taking and converting. *Winterbourne* v. *Morgan* (*e*) resembles this case. *Parke*, B.—That was a case under 11 Geo. 2, c. 19.] The plaintiff, in fact, complains not of the defendant's original entry or continuing in possession, but of the sale developed in the plea, as a substantive trespass. Accordingly, he declares for the conversion, which may extend to that sale. [*Platt*, B.—That is the only way to make the declaration so comprehensive. The introductory part of the plea is all

(*a*) See 1 Wms. Saund. 27, 28 notes. See also 2 Bing. N.C. 473, 479; 1 Q. B. 501, 502; 4 M. & Gr. 335; 2 D. P. C. (N. S.) 78; 5 Scott, 148, 164.

(*b*) See *Fisherwood* v. *Cannon*, cited by *Buller*, J., 3 T. R. 297; also 2 Wms. Saund. 47 g.

(*c*) Dict. *Hale*, C. J.; see Sir *R. Bovy's case*, 1 Vent. 217, and 15 M. & W. 375.

(*d*) See 2 Wms. Saund. 47 g.

(*e*) 11 East, 395.

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you can look to. *Parke*, B.—The defendant need not have pleaded a word about the conversion, but, having done so, and having pleaded something bad in point of law, is the whole plea therefore bad, though containing a perfectly sufficient answer to the rest? If any distinction is taken between omitting to make an allegation, and alleging something bad in point of law, *Fisherwood* v. *Cannon* (*a*) answers it. That case is good law. The selling, though an aggravation of the taking, was not necessarily in itself a trespass.] The plaintiff might treat the sale as a substantive act of trespass. [*Parke*, B.—Yes; since 11 Geo. 2, c. 19, and by sect. 5, if no rent was due he might get double the value of the goods sold. But in this action the jury might give the full value of the goods as taken and not returned, without any proof of sale. Till replication, or new assignment of the subsequent sale of the distress, the defendant cannot know that the plaintiff goes for something ultra what might be sued for under the statute.] Both parties have agreed on what is the trespass. There is no discontinuance, for the answer in the plea is too large, not too narrow (*b*). [*Alderson*, B.—Perhaps nothing in the plea shews the sale to have been lawful; but, on the other hand, nothing shews the contrary.] All the plaintiff says is, that the defendant admits part of the trespass to be the selling, without answering it; *Phillips* v. *Howgate* (*c*). The justification in that case was not directed to mere matter of aggravation, for if, of the two assaults complained of, one only was answered, judgment might have been signed for the other (*d*). [*Alderson*, B.—The justification there was to the taking laid in the declaration. Mr. Justice *Bayley* said—"The plea of the defendant, if true, would have been a good justification, and, as it seems to me, it was necessary to allege the misconduct of the plaintiff, in order to justify the pulling and striking by the defendant; for if it had omitted

(*a*) Cited 3 T. R. 297.
(*b*) See 1 Wms. Saund. 28 note.
(*c*) 5 B. & Ald. 220.
(*d*) See 1 Saund. 28, note.

such an allegation, the plea would have been demurrable." Here you admit the plea would have been good, if it had not extended to the conversion and sale.] A new assignment is only wanted to correct a supposed mistake in the plea; whereas here the plea acknowledges that the defendant knows the sale to be part of the trespasses complained of.

Thirdly, the defendant could not legally lock up the doors of the house to secure the distress, if, by so doing, he shut the tenant out of the house.

J. J. Johnson, in reply.—The gist of the declaration was the taking, and the plea sufficiently answers that. Then the whole declaration is answered (*a*). To have stated that notice of distress was given would have been immaterial. So much of the plea as justifies the conversion and sale is immaterial, and may be rejected as surplusage. Had any chasm in the pleading worked a discontinuance, it might have been different (*b*). [*Alderson*, B.—The declaration does not charge sale, but conversion to the defendant's use. However, the plaintiff argues, that by justifying a sale in the plea, the defendant has enlarged the sense of the word "converted."] At all events, in the absence of a special demurrer, the allegation of the seizure and sale was construing the words according to the form of the statute; so that, if material, the defendant must have proved them: *Dawes* v. *Papworth* (*c*). As to the last point, the defendant would be answerable for damage to the goods while impounded, nor could he have sued again for the rent, had they been eloigned before sale: *Vasper* v. *Eddowes* (*d*). He was therefore justified in locking them up for safe custody (*e*). [*Platt*, B.—If all the goods in the house were distrained, could you lock it up?] Locking up the whole house is not charged, but locking up

(*a*) See *Dyes* v. *Leatherdale*, 3 Wils. 29, cited in *Taylor* v. *Cole*, 3 T. R. 297, and 1 Saund. 28 *a*, note. See *Gates* v. *Bayley*, 2 Wils. 313.

(*b*) 1 Wms. Saund. 28, note (3).

(*c*) Willes, 408.

(*d*) 1 Salk. 248.

(*e*) See *Cox* v. *Painter*, 7 C. & P. 769.

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the doors of it. It is quite consistent with this that the tenant unlocked them at pleasure, or that they were opened whenever he requested. [*Parke*, B.—The declaration does not charge the outer door to have been locked. *Alderson*, B. —The doors laid may have been only the doors of the rooms in which the distress was secured. But the plea does not allege that they were the most convenient place for that purpose.]

PARKE, B.—*Washbourne* v. *Black* (*a*) is an authority, that, in common cases, a party distraining in a dwelling-house must not take the whole of it in which to place the goods, but must select one room for that purpose, or remove them out of the house. Nor does this plea state any necessity to use the whole dwelling-house for the security of the goods, or any license from the plaintiff to do so. We will consider our judgment as to that point.

Cur. adv. vult.

On a later day, PARKE, B., said, that the Court inclined to think that the plea should have shewn that the whole house, or that part of it the doors of which were locked, was necessary, or the most fit and convenient place for impounding and securing the distress under 2 W. & M., sess. 1, c. 5, s. 1, so as to form a lawful pound, otherwise it might appear that the whole house was locked up, without its also sufficiently appearing that it was necessary to do so for the safe keeping of the distress.

The defendant had leave to amend on the usual terms.

(*a*) At Nisi Prius, before Lord *Mansfield*, in 1774, cited 11 East, 405. See *Thomas* v. *Harries*, 1 M. & Gr. 698.

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O'Brien v. Clement.

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In case for libel, the declaration alleged the libel to be, that plaintiff sought admission to a club held in the town of P., and gave an entertainment a few days before he was to be elected as he thought; that three days after he stood the ballot and was black-balled; that next morning he *bolted*, and some of the poor tradesmen had to lament the fashionable character of his entertainment. Plea, that plaintiff did suddenly leave and quit the town of P. without paying every one and all of the debts contracted by him with *divers* persons in the said town, and without notice to them, and with intent to defraud and delay *some* of the last-mentioned persons, whereby the said persons remained unpaid and defrauded:—*Held* bad on special demurrer, for not stating the names of the persons alleged to have been defrauded.

The declaration also averred, that the libel used the words "black-legs" and "black sheep" to denote persons guilty of fraud, and that divers persons had formed a club called "The Royal Western Yacht Club;" that defendant, intending to cause it to be believed that plaintiff was a confederate of persons guilty of fraudulent play at cards, and of being black-legs and black sheep in the sense aforesaid, in a certain newspaper, &c., published *of and concerning the plaintiff* the following libel: "Royal Western Yacht Club.—Expulsion of two black-legs" (meaning an expulsion from the club of two persons being black-legs in the sense in which that word was used as aforesaid). The declaration then alleged, that suspicion had attached to two members (meaning the aforesaid two persons) of the club, owing to two gentlemen having been plucked at cards, at the residence of one of the two suspected members, in a manner seeming to indicate foul play; that inquiry took place, which resulted in expelling the two suspected persons; that a person, known to be a confederate of the expelled parties, sought admission into the club. His name was O'B. (meaning thereby the plaintiff):—*Held*, on motion in arrest of judgment, that, as matter shewn to be libellous by prefatory averment was so coupled with innuendoes in the declaration as to shew it to have been published by the defendant of and concerning the plaintiff, the declaration need not aver it to be also published of and concerning the Royal Western Yacht Club, or any other part of the prefatory averment.

CASE for libel.—The declaration, after the usual inducement of the plaintiff's good character, stated that, before and at the time of the committing of the grievances by the defendant, and also in the libel hereinafter mentioned, the defendant used the word "black-legs" for the purpose of expressing, and intending, and meaning thereby, and the said word so used by the defendant was by divers, to wit, all the persons to whom the defamatory matters hereinafter mentioned were published, understood as expressing, intending, and meaning thereby, persons guilty of cheating others, and of practising fraud upon others; and that, before and at the time, &c., and also, &c., the defendant used the words "black sheep" for the purpose of expressing, and intending, and meaning thereby, and the said last-mentioned words so used by the defendant were by divers, to wit, all persons to whom the defamatory and libellous matters hereinafter mentioned were published, understood as expressing and meaning thereby, persons notorious by reason of disreputable character, and of a sullied reputation. That before, &c., certain persons whose names were to the plaintiff unknown, had

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associated themselves together, and formed and then composed a certain club or association, called or known by the name of the "Royal Western Yacht Club," and were then accustomed to hold meetings in the town &c. of Plymouth, in the county of Devon. Yet the defendant, well knowing, &c., but contriving, &c., to injure the plaintiff in his good name, &c., and to cause it to be suspected and believed that the plaintiff had been and was connected and associated with, and a confederate of, persons guilty of unfair and fraudulent play at cards, and of defrauding persons of their money by means thereof; and that the plaintiff kept company and associated, and was in league with, and was a confederate of, persons so being "black-legs" and "black sheep" in the respective sense and signification in which these words were so respectively used by the defendant as aforesaid, and that the plaintiff was himself a black-leg and a black sheep in the same sense and the signification in which such last-mentioned respective words were so used respectively by the defendant as aforesaid, and a person of a disreputable, low, and bad character, and that he had been engaged and concerned in nefarious transactions, and had been convicted thereof and imprisoned therefor; and that he had also been and was guilty of the other offences and misconduct hereinafter mentioned to have been charged upon and imputed to the plaintiff by the defendant, and to ruin his prospects and position in life and society, and wholly to oppress the plaintiff, heretofore and before, &c., to wit, on &c., in a certain newspaper called "*Bell's Life in London and Sporting Chronicle*," wickedly and maliciously did publish and cause to be published, of and concerning the plaintiff, the false &c. &c., and libellous matters following, *of and concerning the plaintiff*, that is to say:—"Royal Western Yacht Club" (meaning the said Royal Western Yacht Club), "Expulsion of two Black-legs" (meaning an expulsion from the said Royal Western Yacht Club of two persons being black-legs in the sense and signification in which

the said word was so used by the defendant as aforesaid). "For some time past, circumstances of suspicion had attached to two members" (meaning the aforesaid two persons) "of this club" (meaning the said Royal Western Yacht Club), "owing to two gentlemen having been plucked at the residence of one of the suspected members" (meaning one of the aforesaid two persons) "in a manner that seems to indicate foul play. One of the party was fleeced to the amount of £1070 in one evening at cards, and the other gentleman lost above £200. In the case of the first gentleman that we" (meaning thereby the defendant) "have alluded to, the parties were betting on the turn-up card of his opponent" (meaning thereby one of the aforesaid two persons), "who managed to turn up a king nine times running. All these circumstances led to suspicion, that suspicion led to inquiry, and the inquiry has resulted in the expulsion of the two suspected persons" (meaning the expulsion of the aforesaid two persons), "and of one of them" (meaning one of the aforesaid two persons) "suddenly leaving the town" (meaning the said town of Plymouth). "A short time since a person" (meaning the said plaintiff), "known now to be a confederate of the expelled parties, sought admission into the club" (meaning the said Royal Western Yacht Club). "His" (meaning the plaintiff's) name was O'B" (meaning thereby the said plaintiff). "He" (meaning the plaintiff) "gave a crack entertainment a few days before he" (meaning the plaintiff) "was to be elected" (meaning, elected a member of the said Royal Western Yacht Club), "as he" (meaning the plaintiff) "thought, and his" (meaning the plaintiff's) "party was graced by almost all the rank and fashion of the neighbourhood. He" (meaning the plaintiff) "was going to make his" (meaning the plaintiff's) "*entrée* into the club" (meaning the said Royal Western Yacht Club) "in great style—two or three days he" (meaning the said plaintiff) "stood the ballot, and he" (meaning the plaintiff) "was blackballed. The next morning

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he" (meaning the plaintiff) "*bolted*, and some of the poor tradesmen had to lament the fashionable character of his" (meaning the plaintiff's) "entertainment, and the great desire he" (meaning the plaintiff) "had for display. The talk and excitement that this blackballing occasioned was very great. Other gentlemen who stood the ballot about the same time, trembled lest the same fate might await them, especially as one blackball in seven excludes any who may seek for admission. Subsequent events prove that the course adopted with regard to Mr. O'B." (meaning thereby said plaintiff) "was a very judicious and wise one." The declaration then set out more libellous matter, as to which part, beginning "It turns out," an apology had been made under 7 & 8 Vict. c. 96.

Pleas,—1. Not guilty, except as to the last-mentioned matter; 2. And for a further plea in this behalf, except as to that part of the supposed libel beginning with the words "It turns out," to the end of the supposed libel, and except as to so much of the cause of action as relates thereto, defendant says, that before the committing of the grievances, to wit, on &c., and from thence continually until and at the time of the committing of said grievances, certain persons whose names are to the defendant unknown had been and were "black-legs" and "black sheep" within the meaning of those words as in the declaration mentioned," and common gamesters and cheats at play, and the plaintiff, during all the time aforesaid, was connected and associated with, and a confederate of, those persons; and that the plaintiff, during all the time aforesaid, had notice of the premises, and kept company and associated, and was in league with the said persons so being "black-legs" and "black sheep," as in the said declaration is alleged, and knowingly and wilfully assisted them in their practices as such gamesters and cheats; and two persons, to wit, A. B. and C. D., had been, to wit, on the 1st of October, 1845, cheated and defrauded at cards by the said two

persons, whose names are to the defendant unknown, of large sums of money respectively, to wit, the said A. B. of the sum of £1070, and the said C. D. of the sum of £200, whereof the plaintiff during all the time aforesaid had notice. That before the time of the committing of the said grievances, to wit, on &c., the plaintiff, then being at Plymouth, &c., gave an entertainment to and invited divers, to wit, 100 persons to eat and drink, and then and there gave and furnished to the said last-mentioned persons divers rich and expensive meats, drinks, and luxuries, before then, to wit, on &c., bought on credit by the plaintiff of and from divers persons at Plymouth aforesaid. That afterwards, and before the committing of the said grievances, to wit, on, &c., the plaintiff was, by his own consent and at his wish, balloted for, and was a candidate for admission into a club and association of persons called "The Royal Western Yacht Club," and that the plaintiff, at the said ballot for election into the said club, was not elected into the said club, but was, to wit, on &c., black-balled, that is to say, rejected and refused admission into the said club by the members thereof. That the next morning, after the said balloting had taken place, to wit, on &c., the said credit having then expired, the plaintiff did suddenly leave and quit the town of Plymouth aforesaid, where he had been so residing, without paying and discharging every one and all of the debts con tracted by the plaintiff with *divers* persons in the said town of Plymouth, and without notice to all the said last-mentioned persons, and with intent to defraud and delay some of the said last-mentioned persons, whereby the said last-mentioned persons so not receiving notice as aforesaid remained and were, to wit, on &c., unpaid and defrauded; wherefore the defendant afterwards, and at the said several times when, &c., did publish, and cause and procure to be published, the said supposed libellous matter in the declaration mentioned, except as in the introductory part of this plea mentioned, as he the defendant lawfully might for

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the cause aforesaid, which are the same publishing and causing to be published the said supposed libellous matters as are in the declaration mentioned, except &c.—Verification (*a*).

Special demurrer to the second plea, for the following (among other) causes of demurrer: that the defendant does not allege, shew, or specify, in or by his said plea, the particular person or persons of and from whom plaintiff bought on credit the meats, drinks, and luxuries, in the plea mentioned, or any part thereof, or for what space of time, or to whom the said credit was given; also that the defendant has not specifically set forth or shewn in and by his said plea how many or what debts the plaintiff left and quitted Plymouth without paying and discharging, or with what

(*a*) The following plea was also pleaded under 6 & 7 Vict. c. 96, s. 2. "And for a further plea in this behalf, as to so much of the said cause of action as is in the introductory part of the 1st plea excepted, defendant says, that the said libel in the said declaration mentioned, was contained in, and that the publication in the declaration mentioned was a publication in, a certain public newspaper, to wit, "Bell's Life in London and Sporting Chronicle," then published weekly; and that so much of the said libel as is in the defendant's said first plea excepted, was inserted in the said newspaper, to wit, on the day and year in that behalf in the declaration mentioned, without actual malice and without gross negligence. And the defendant further says, that after the publication thereof, and at the earliest opportunity after the commencement of this action, to wit, on &c., and on &c. the said last-mentioned two days, being the days of the publication of one number or weekly part of the said newspaper, he, the defendant, inserted in the said newspaper a full apology for so much of the said libel as in the introductory part of this plea mentioned. And the defendant now brings into Court here the sum of 10*s*. ready to be paid to the said plaintiff, by way of amends for the injury sustained by the plaintiff by and through the publication of so much of the said libel as is in the introductory part of this plea mentioned. And the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of 10*s*. in respect of the said cause of action in that behalf, in the introductory part of this plea mentioned.—Verification.

particular person or persons the plaintiff contracted the same; or to what particular person or persons the same were due and payable; or that the plaintiff had been or was in any way ever liable, by law or otherwise, to pay or discharge the same, or any of them; or that they were debts due and payable at the time of the plaintiff's suddenly leaving and quitting Plymouth, or that the time for payment thereof had then expired.—Joinder in demurrer.

Lush, in support of the demurrer.—*Janson* v. *Stuart* (*a*) distinctly proves that the names of the tradesmen who are alleged to have been unpaid or defrauded by the plaintiff should have been set out. [He was here stopped by the Court.]

C. Clark, contrà, in support of the plea.—The declaration only states, that *some* tradesmen had to lament the fashionable character of the plaintiff's entertainment; so that, to hold it necessary to name those tradesmen in the plea, would be requiring the plea to go beyond the declaration in certainty.

PER CURIAM (*b*).—The plea should have stated the names of persons who were in fact defrauded. *Janson* v. *Stuart* is followed up in *Hickinbotham* v. *Leach* (*c*). The plea must be amended by inserting their names, or the judgment must be for the plaintiff.

Judgment for the plaintiff.

At the trial of the issue in fact, at the Middlesex sittings after Michaelmas Term, 1846, before *Pollock*, C. B., the jury found a verdict for the plaintiff. In Hilary Term, 1847,

(*a*) 1 T. R. 748. See judgment of *Ashurst*, J., in *Newman* v. *Bailey*, 2 Chit. R. 665.

(*b*) *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*c*) 10 M. & W. 362.

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The *Attorney-General* (*C. Clark* with him) moved in arrest of judgment.—The matter complained of not being libellous in itself, it was necessary to explain it by prefatory averments, and to add innuendoes applying it, as so explained, to the plaintiff. But there is no statement that the libel was published of and concerning him and the Royal Western Yacht Club; so that the publication is harmless as respects him, and the prefatory averment, which was required to shew how the matter complained of became libellous at all, is not coupled with the innuendo which applies that libel to him. [*Parke*, B.—The libel does not reflect on the club, but on the plaintiff.] Still it is unintelligible as regards him, for want of connection with the club previously described. [*Platt*, B.—Suppose this were a libel on an attorney, it would be sufficient to say that it was published of and concerning him in his character as an attorney, without alleging the particular in which he was supposed to have misconducted himself.] That is only so because allusion to a plaintiff's professional character may make matter libellous which would otherwise be innocent; whereas this publication can only be libellous as regards this plaintiff, if published of and concerning him in reference to the transactions disclosed in the prefatory averments. Strike out the prefatory averment, and there is nothing libellous on the face of the declaration for the innuendo to apply to the plaintiff. The rule is, that if matter requires prefatory averment to shew it to be libellous, the libel must be laid to be published of and concerning that averment, as well as of and concerning the plaintiff. In *Hall* v. *Blandy* (*a*), *Alexander*, C. B., says, "If all the other introductory matter were put out of the question, the name of the party being mentioned in the libel, and there being an averment that it concerned him, and that it concerned also that certain piece of gold coin of the realm,

(*a*) 1 Y. & J. 480, 490.

the first count would be sufficient." *Jones* v. *Stevens* (*a*) is to a like effect. Most of the precedents allege, in such cases, that the libel was published of and concerning the plaintiff, and of and concerning the premises.

PARKE, B.—The plaintiff was bound to allege the libel to have been published, not of or concerning the matter laid by way of prefatory averment, but of and concerning himself, in the position or character in which by that prefatory averment he was explained to stand. The words "of and concerning" are only used to shew that the matter previously explained to be libellous was published with respect to the party complaining of it as such. The precedents alluded to always appeared to me to be inartificially framed. The use of the prefatory averment is to afford foundation for subsequent innuendoes, by explaining the meaning of the words used, and it is here properly coupled with the innuendoes. The learned Baron mentioned *Alexander* v. *Angle* (*b*).

ALDERSON, B.—Coupling the innuendoes with the prefatory averment, it appears alleged that the defendant published of and concerning the plaintiff the words which the plaintiff had before shewn to be libellous by introductory averments.

POLLOCK, C. B.—It was hardly necessary to explain either "black sheep" or "black-leg" to be libellous. But the plaintiff does explain them in the introductory part, and it was not necessary to explain them over again afterwards.

Rule refused.

(*a*) 11 Price, 235.
(*b*) 1 C. & J. 143; 1 Tyr. 9; 7 Bing. 123. See 11 M. & W. 295.

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O'Brien *v.* Bryant and Others.

A libellous paragraph published of the plaintiff in a newspaper, stated (in substance) that he was a confederate of black-legs; that he had sought admission into a Yacht Club; that he gave an entertainment in the expectation of being elected, but was black-balled, and the next morning *bolted*, and some of the tradesmen of the town had to lament the fashionable character of his entertainment. A plea of justification, after alleging facts to shew that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and of his being blackballed, as mentioned in the libel, &c., stated that on the following morning "he *quitted* the town and neighbourhood, leaving divers of the tradesmen, to whom he owed money, unpaid" [naming them]:—*Held* bad, inasmuch as such *quitting* might be innocent, and without any intention to defraud.

CASE for libel. The declaration was similar to that in *O'Brien* v. *Clement* (ante, p. 159). The defendants, by their third plea of justification, said, it was true that, before the publishing of the said newspaper, and the committing of the said alleged grievances, circumstances of suspicion had attached to two members of the said Royal Western Yacht Club, that is to say, M. M'D., and J. H. H., being persons of disreputable fame and character, and black-legs, as in the declaration mentioned, in consequence of two gentlemen, to wit, J. F., and E. J. C., having, to wit, on &c., at the residence of one of the said suspected members, to wit, of the said M. M'D., lost to the said suspected members, in a manner that seemed to indicate foul play, and by foul play, large sums of money, to wit, one of the said gentlemen, J. F., the sum of £1070, in one evening at cards, to wit, at a game called Ecarté; and the other, a large sum, to wit, above £200, to wit, £210; that is to say, in the case of the first of the said gentlemen, the parties were engaged on the occasion in that behalf herein aforesaid at cards, to wit, at Ecarté, and betting thereon, and his opponents, being the said suspected members, managed, to wit, by fraudulently and unfairly shuffling and disposing the cards, to turn up a king nine times running; and, in the case of the latter of the said two gentlemen upon the occasion in that behalf herein aforesaid, he was by the said suspected members cheated and defrauded out of the said sum in that behalf herein aforesaid, to wit, by the unfair and fraudulent shuffling and disposition by them of certain cards wherewith they were then engaged in play, to wit, at Ecarté, with the said last-mentioned gentleman; and the

defendants say, that it is true that these circumstances led to suspicion, to wit, on the part of other members of the said club, to wit, on &c., and before the committing of any of the alleged grievances by the defendants; and that the suspicion then led to inquiry, to wit, on the part of the other members of the said club, and the inquiry then resulted in the expulsion of the said two suspected persons from the said club, and one of them, to wit, M. M'D., suddenly leaving the town of P., to wit, on &c.; and the defendants further say, that, a short time before the committing of the said alleged grievances by the defendants, and before the said inquiry and expulsion, to wit, on &c., the plaintiff sought admission into the said club, and that afterwards, and before &c., he was known to be, and to have been, to wit, for a long time, to wit, for six months then next preceding, and in fact then was, a common associate, friend, and confederate of the said expelled parties, and that the plaintiff, a few days before the day of his said intended admission and election into the said club, to wit, on &c., gave an entertainment, at which divers and many persons in the neighbourhood of P. attended, and that, in two or three days afterwards, to wit, on &c., the plaintiff was blackballed on the ballot for his proposed admission into the said club, and that, on the following morning, he (*a*) *quitted* the town and neighbourhood of P., leaving divers of the tradesmen of that town and neighbourhood, to whom he then owed divers sums of money, unpaid, to wit, A. B., C. D., &c.; and the said blackballing caused and occasioned much talk and excitement, to wit, in the town and neighbourhood of P., to wit, on &c.; and that the subsequent events, to wit, the said inquiry, and the expulsion of his said friends and associates, proved that the said course so adopted with regard to the plaintiff was a judicious and wise one; where-

(*a*) On the amendment of the plea, the words "suddenly left and" were introduced here.

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fore the defendants published the said matter in writing, as they lawfully might for the cause aforesaid. Verification.

Special demurrer to the above plea, for the following (among other) causes. For that the defendants, as and for a justification for the publication of the following part of the said libel in the latter part of the said libel and declaration contained, namely, "the next morning, he (meaning the said plaintiff) *bolted*, and some of the poor tradesmen had to lament the fashionable character of his (meaning the plaintiff's) entertainment, and the great desire he (meaning the plaintiff) had for display," have in and by the said plea stated and alleged, namely, that on the following morning he *quitted* the town and neighbourhood of P., leaving divers of the tradesmen of that town and neighbourhood, to whom he then owed divers sums of money, unpaid, to wit (names stated); whereas, if such allegations and statements of the defendants in their said plea were and are true in part, yet they are not, nor is any of them, any justification or excuse for the publication of the said last-mentioned part of the said libel by the defendants, or any answer to this action for or in respect of such publication thereof; also, for that the said third plea is pleaded to and affects to answer the whole of the said action, yet fails and falls short of justifying the whole of the libel in the declaration contained, or any part thereof.—Joinder in demurrer.

Lush, in support of the demurrer.—The plea, in stating that the plaintiff *quitted* the town of P., does not come up to the libel, so as to justify it. The libel meant, that the plaintiff, being insolvent, suddenly left the town of P. on that account, and defrauded his creditors, whereas, consistently with this plea, his creditors might have assented to his leaving, and he might have returned next day and paid them, or might have left one shilling only unpaid.

Greenwood, in support of the plea.—Taking the whole

plea together, it imputes fraud as well as insolvency to the plaintiff, namely, in leaving the town without paying his creditors, and in order to avoid paying them.

PARKE, B.—The libel, as stated in the declaration, imputes to the plaintiff a fraudulent evasion of his creditors, he being unable to pay them. The plea does not meet that, for the plaintiff might be unable to pay, without being guilty of fraud, as imputed by the word "*bolting*," used in the libel. That expression charged the plaintiff with going away suddenly from Plymouth, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore means more than the mere "*quitting*," which is stated in the plea. That would be an innocent departure, and consistent with proof that the plaintiff went out of the town for a day, but then returned and paid his debts. It is sufficient for us to say that this plea is bad on general demurrer. The defendant may amend, or our judgment must be for the plaintiff.

ROLFE, B., and PLATT, B. concurred.

Leave to amend on payment of costs, otherwise

Judgment for the plaintiff (*a*).

(*a*) The amendment introduced was as follows:—

"And without notice to the said last-mentioned persons, and with intent to defraud and delay some of the said last-mentioned persons, whereby the said persons remained and were, to wit, on the day and year last aforesaid, unpaid and defrauded, and had reason to lament, and did lament, the fashionable character of the said entertainment, and the great desire the said plaintiff had for display."

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A person may be arrested on a Sunday for *any indictable offence.*

RAWLINS *v.* ELLIS and Others.

THIS was an action for assault and false imprisonment, to which the defendant pleaded not guilty, by statute; and issue having been joined thereon, the following case was, by consent, and by an order of *Alderson*, B., stated for the opinion of the Court.

The defendants Darby and Spary were police-inspectors, appointed under the 2 & 3 Vict. c. 94, the London Police Act, and the other defendant, Ellis, was a police-inspector under the Middlesex Police Act, 10 Geo. 4, c. 44. On the 12th of March, 1845, Lord *Denman* issued a bench warrant for the plaintiff's apprehension, upon the certificate of the Clerk of the Central Criminal Court, that the plaintiff, John Rawlins, had been indicted at the Central Criminal Court "for unlawfully conspiring together, by divers artful stratagems and divers false and feigned distresses, to deprive T. Reeve of the peaceable possession of a certain house and premises, situate in the parish of St. Dunstan in the West, against the peace," &c. The warrant then directed all constables, &c., to apprehend the said John Rawlins, and bring him before a judge of the Court of Queen's Bench, or a justice of the peace, that he might be bound for his appearance at the Central Criminal Court, to answer the said indictment. The defendant Ellis, to whom the warrant was directed, arrested and imprisoned the plaintiff in a police-station, and the other defendants imprisoned him in another police-station, whence he was taken to a judge's chambers, and there committed to Newgate for trial. The plaintiff was afterwards tried and acquitted.

If the Court shall think that the arrest on a Sunday was lawful, a judgment of *nolle prosequi* is to be entered; if the arrest should be considered unlawful, judgment by confession is to be entered against the defendants.

Martin, for the plaintiff.—This case depends on the construction of the stat. 29 Car. 2, c. 7, s. 6, which enacts, "that no person, upon the Lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or *breach of the peace*), but that the service of every such writ, &c., shall be void to all intents and purposes whatsoever." This is the case of an arrest for *conspiracy*, which is no actual or constructive breach of the peace. It ought to be such a breach of the peace as would be a forfeiture of a recognizance to keep the peace. [*Alderson*, B., referred to *Rex* v. *Myers* (*a*).] There it was held that a party convicted on a penal statute cannot be apprehended on a Sunday for non-payment of the penalty. It was contended in that case, that the act, being prohibited by act of Parliament, was indictable, and so amounted to a constructive breach of the peace; but the Court was of a contrary opinion. An indictment for this conspiracy need not conclude "contra pacem."—He referred to Com. Dig. tit. "Indictment" (B), and (G. b); and tit. "Justice of the Peace," (B. 8).

Atherton and *Hugh Hill* appeared for the several defendants, but were not called upon to argue. They mentioned the case of *Sir* —— *Cecil* v. *Others of the Town of Nottingham* (*b*).

ALDERSON, B.—The meaning of the statute is, that it authorises the arrest on a Sunday of all persons who have been guilty of any *indictable offence*. How is the officer to know whether an *actual* or a *constructive* breach of the peace has been committed? As it is, he sees that an offence has been committed, and accordingly arrests the party. That is a plain and intelligible rule.

(*a*) 1 T. R. 265. (*b*) 12 Mod. 348.

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ROLFE, B.—The warrant is directed to "all constables and others," and requires them to apprehend the party. It cannot be that they are all to inquire whether there has been an actual or constructive breach of the peace.

PLATT, B., concurred.

Judgment for the defendants.

Nov. 28.

A person who hires or procures for another persons to be employed by him in the laying out and surveying of a line of railway, is not a *broker* within the stats. 13 Edw. 1, st. 5, and 6 Ann. c. 16, s. 4, which prohibit persons from acting as brokers within the city of London, unless licensed by the Court of the Mayor and Aldermen.

MILFORD *v.* HUGHES.

ASSUMPSIT for work, labour, journeys, and attendances, done, performed, and bestowed for the defendant on his retainer, and for commission and reward.

Plea, that the work, labour, journeys, and attendances of the plaintiff were done and performed by the plaintiff within the city of London, as a broker, to wit, in and about the procuring and hiring, on account of the defendant, of one J. L., one E. S., one P. W. B., and one T. C., to be employed by the defendant in laying out and surveying a certain line of railway, and that the said commission and reward were claimed by the plaintiff in respect of such work, labour, journeys, and attendances; and that the plaintiff was not, at the times of doing and performing the said work, labour, &c., a broker duly licensed, authorised, or empowered to act as a broker in the premises, within the city of London.—Verification.

Demurrer, and joinder.

Lush, in support of the demurrer, was stopped by the Court.

Stammers, contrà.—The plaintiff is a broker within the

meaning of the statutes 13 Edw. 1, s. 5, and 6 Anne, c. 16, s. 4, and therefore he cannot act as such within the city of London without having been duly licensed. [*Alderson*, B. —Was he a broker here?] Yes. A broker may be properly defined to be a person who acts as a *mediator* or go-between, for the purpose of making contracts between one man and another. Nor is the character confined to contracts relating to mere bargains and sales. In *Highmore* v. *Molloy* (*a*), Lord *Hardwicke* considered a *pawnbroker* as a broker within the statutes, taking "the word *brokers* as the genus, and all other kinds of brokerage as the species;" and in *Cope* v. *Rowlands* (*b*), a *stockbroker* was held to be within the statutes. [*Alderson*, B.—Stock is merchandise, and the parties are merchants pro hâc vice.] From the definitions given in the Termes de la Ley, title "Broker," and Cowell's Interpreter, "Broker," it appears that the word signifies an *intercessor* or *mediator* in any transaction or contract. In the Scottish "Statuta Gildæ," c. 27, this enactment is found: "Statuimus quod *broccarii* sint electi per communiam villæ, qui dabunt singulis annis unum dolium vini villæ, ad festum S. Michaelis, sine ulteriore dilatione, et nomina eorum inbrevientur per commune concilium." Upon this statute, the old book called the "Regiam Majestatem Scotiæ," a work of great authority on Scotch law, has this note (p. 158 a.): "Brocarii, in jure civili, sunt *proxenetæ*, qui sunt *interpretes et consiliatores contractuum*, et operam suam navant his qui contrahunt; ut sunt fæminæ conciliatrices nuptiarum." In Calthorpe's Reports, p. 165, we find a charge given to the wardmote inquests of the city of London, to inquire as to "woman brokers," who are described as persons who entice servants from their places, promising to help them to a better service. The term "marriage brocage" is also used in the common law. In the Dictionary of Facciolatus, (Bailey's edit., Vol. ii. p. 309), the word "proxeneta" is defined as

(*a*) 1 Atk. 206. (*b*) 2 M. & W. 149.

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"a go-between in making bargains, &c., a match-maker, προξενητής, conciliator, interpres duorum inter se stipulantium aut spondentium, aliumve quemvis contractum conventumque ineuntium." In the Digest, Lib. 50, tit. 14, there is a section "De Proxeneticis;" and Accursius, in his commentary thereon, says, "Proxenetæ sunt qui intromittunt se circa amicitias faciendas inter aliquos, et circa matrimonium et circa assessorem inveniendum, et circa emptiones et venditiones et alios contractus." [*Alderson*, B.—Your definitions would include a *factor;* but the difference between a factor and a broker is clearly pointed out in *Baring* v. *Corrie* (*a*).] In *Pott* v. *Turner* (*b*), *Tindal*, C. J., says, "A broker is one who makes bargains for another, and receives a commission for so doing, as, for instance, a stockbroker." In the case of *Hutchins* v. *Player* (*c*), Sir *Orlando Bridgman* refers to the case of *Andrew de Vyne* (24 H. 6), the record of which is copied in "The City Register Book, called Liber Dunthorn, which (he says) also contains an extract of divers other ancient records;" and he speaks of it as "a full and express judicial authority as may be, upon general advice with all the judges." [The learned counsel here read to the Court a considerable portion of the record in that case, with an examined copy of which he had been furnished from the office of the town-clerk of London, where the "Liber Dunthorn" is kept (*d*).] [*Alderson*, B.—The word "abrocator," in that case, means a mediator in bargains *between merchants*. But does this plea raise your point? It only alleges, that the plaintiff did work for the defendant "*in and about* the procuring and hiring of certain persons," but it does not say that those persons were hired, or even that the plaintiff made any contract of hiring or other bargain with them. It is quite consistent with the plea, that the plaintiff was only employed by the defendant to

(*a*) 2 B. & Ald. 137.
(*b*) 6 Bing. 702.
(*c*) Orl. Bridg. 280.
(*d*) See note at the end of the case.

fetch the parties, in order that bargains might be made with them; but that no contract ever was made in consequence. *Rolfe*, B.—For all that appears, the contract itself might have been made as a sworn broker.] If the plea be defective in that respect, the Court will perhaps allow it to be amended, so as to raise the real point.

ALDERSON, B.—We think no amendment would make the plea a good one. The Law Dictionary defines brokers to be "those that contrive, make, and conclude bargains and contracts *between merchants and tradesmen*, for which they have a fee or reward." With respect to the record in *Andrew de Vyne's case*, taking the whole together, the "mediator" there spoken of must be understood to mean a mediator "inter mercatorem et mercatorem." The case, indeed, is valuable only as shewing the meaning of "communis correctarius." There will be judgment for the plaintiff.

ROLFE, B.—It seems to me, that to make it a case of brokerage, it must relate to goods and money, and not merely to personal contracts for work and labour.

Judgment for the plaintiff (*a*).

(*a*) The learned counsel for the defendant has favoured the reporters with a copy of the record in *Andrew de Vyne's case*, which is inserted here:—

"1455, 34 Hen. 6. Henricus Dei gratiâ Rex Angliæ et Franciæ et Dominus Hiberniæ Majori et Vicecomitibus London salutem. Mandamus vobis quod Andream de Vyne, quocumque nomine cenceatur, captum, et in prisonâ, sub custodiâ vestrâ, vos prefati Vicecomites, detentum, ut dicitur, habeatis coram nobis, in cancellariâ nostrâ, die lunæ proxime futuro, ubicumque tunc fuerit, unâ cum causâ capcionis et detencionis ipsius Andreæ in prisonâ predictâ: et hoc nullatenus omittatis: et habeatis ibi hoc breve. Teste meipso apud Westmonasterium, primo die Marcii, anno regni nostri tricesimo quarto. Super quo dicto die lunæ prefatus major, ac Johannes Yonge et Thomas Oullgreve, Vicecomites prædictæ ci-

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vitatis, assumptis secum Aldermannis, Recordatore, Communi narratore, Subvicecomitibus, ac cæteris de consilio civitatis existentibus, personalitèr accesserunt ad cancellariam Domini Regis predictam; et vigore brevis predicti tunc ibidem retornaverunt corpus prefati Andrea de Vyne, unâ cum causâ capcionis et detencionis suæ in prisonâ predictâ, in hæc verba:

"Nos Willielmus Marwe Major, Johannes Yonge et Thomas Oullgreve, Vicecomites civitatis London, significamus Domino Regi in cancellariâ suâ, quòd ante adventum brevis Domini Regi nobis directi et huic cedulæ consuti, Andreas de Wyne in dicto brevi nominatus, captus fuit in civitate predictâ, et in prisonâ dicti Domini Regis, sub custodiâ nostrum prefatorum Vicecomitum ibidem detentus, pro eo quod ubi, pro statûs republicæ bono et incremento, meliorique supportacione tocius legalis mercaturæ, ac pænaliori castigacione cujuscumque falsæ chevanciæ et usuriæ; necnon ad tollenda evitanda et excludenda magna et intollerabilia dampna mala et incommoda atque scandala manifesta quæ sæpius ibidem universali civitati evenerunt, et pluries originem contraxerunt per communes correctarios seu abrocatores in civitate prædictâ, per majorem, aldermannos, et communitatem ejusdem civitatis, juxta leges, provisiones, ordinaciones, libertates, et liberas consuetudines suas, auctoritate diversorum Parliamentorum acceptatas, approbatas, conformatas, et ratificatas; salubriter provisum et ordinatum fuit, ab antiquo, quòd nullus *cujuscumque statûs, gradûs, sexûs, seu condicionis fuerit*, tunc in futurum, officium sive occupacionem *communis correctarii seu abrocatoris*, in civitate predictâ, aliquo modo, exercerent, neque super se assumeret, nec de correctagio seu abrocagio hujusmodi, aut *de contractu seu barganeo quocumque* inter mercatorem et mercatorem faciendo, in civitate predictâ, *tanquam communis abrocator, seu mediator hujusmodi*, se intromitteret quoquomodo, quousque per majorem et aldermannos civitatis prædictæ, pro tempore existentes, ad hoc faciendum et exercendum, admissus fuerit et juratus, ac sufficientes manucaptores ad se benè et fideliter habendum et gerendum in officio sive occupatione prædictâ invenerit; juxta vim, formam, et effectum legum, provisionum, libertatum, et consuetudinum prædictarum, sub pœna imprisonamenti, et faciendi finem ad opus communitatis civitatis prædictæ. Ibî dictus Andreas in dicto brevi nominatus, non admissus nec juratus per majorem et aldermannos civitatis prædictæ, nullisque hujusmodi manucaptoribus, ut prædicitur, per ipsum hucusque inventis, post defensionem et prohibitionem mei præfati majoris, sibi ex parte meâ inde pluries factam, officium, exercicium, seu *occupationem communis correctarii, abrocatoris, seu mediatoris inter mercatorem et mercatorem* pro diversis contractibus et barganeis,

per ipsum factis et firmatis in civitate prædictâ, sæpius exercere curavit, et super se assumpsit; pluresque hujusmodi contractus, sic, *ut communis abrocator seu mediator, inter hujusmodi mercatorem et mercatorem*, in civitate prædictâ, indies fecit, iniit, conclusit, et firmavit; ac de hujusmodi contractibus et barganeis se multipliciter intromisit; in contemptum Domini Regis et civitatis prædictæ, ac in prejudicium et derogationem ligeorum dicti Domini Regis in eâdem civitate, ac ceteris in perniciosum exemplum in futurum, necnon expressè contra formam legum, libertatum, et consuetudinum prædictarum: unde idem Andreas, per confessionem suam propriam, coram me præfato majore et sociis meis, aldermannis civitatis prædictæ, convictus existit. Detentus est eciam idem Andreas in prisonâ, sub custodiâ prædictâ, virtute cujusdam querelæ versus ipsum, per nomen Andreæ de Vyne, de Venetiis, ad sectam Johannis Pecok, grocer, in placito debiti super demandam 280*l.*, coram me prefato Johanne Yonge, in curiâ dicti Domini Regis in civitate prædicta levato, et adhuc ibidem pendente indeterminato: et hæc sunt causæ capcionis et detencionis ipsius Andreæ in prisonâ prædictâ. Corpus tamen ejusdem Andreæ coram vobis promptè habemus, prout in dicto brevi nobis præcipitur.

"This is the answere of the seid Andrewe de Vyne to the retourn of the seid mair and sherefs —The seid Andrewe seith that the mater conteyned in the seid retourn touchyng the occupacion called by the seid mair and shirrefs brocage or correctage, is not sufficient whereby the seid mair and shirrefs by the lawe ought to have taken and enprisoned the seid Andrew, or in prison witholde. For the seid Andrewe seith, that all marchaunts estraungers and all other marchaunts of the Kyng oure Soueraigne Lordys amytee mowe lawfully selle all their merchaundises in the seid citee of London and every other place of England to euery persone excepte to oure seid souerayn lord the Kynges enemys, as well by foreyns as by denisenis, any estatute, ordenaunce, chartre, letters patents, fraunchises, proclamacions, maundement, usage, allowance, or jugement, made or used to the contrarie notwithstondyng, by vertue of dyuerse estatutes made and ordeyned in dyuerse Parlements in the tyme of the Kyng our Souerayngne Lord that nowe is, and his noble progenitours, as well Kyng Herry the Fourth, King Richard, and Kyng Edward the Thirde; and for as moche as the seid meir and sherrefs have by their seid retourn confessed that they, contrary to the seid estatutes and ordenaunces, have taken and emprisoned the seid Andrewe, the which is of the amyte and under the proteccion of the Kyng oure Soueraigne Lord, prayeth to be dismyssed oute of this courte, and discharged of the seid arrest: and as to the second cause conteyned in the seid retourn, the seid Andrew seith, that he bar-

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gayned with the seid John Pecok for Richard Raulyn of London ten bales peper, which amounteth to the somme of 280*l.* or abowte that somme, the price of every pound 8½*d.*; and after the seid John Pecok for asmoche as he perceyved that the pepir was of bettyr value, and the price therof was risen to better somme, wold not delyver the said pepir, nor noo parcell thereof, but yet witholdeth, ayenst feith and trouth; and for the seid somme of 280*l.* sueth also the seid Andrewe withoute cause: the which matiers the seid Andrewe is redy to proue as this court will awarde: wherfore he prayeth to be dismyssed oute of this courte; and he is redy to pay the seid John Pecok the seid 280*l.*, if he will delyver the seid pepir accordyng to the seid bargeyn, if the seid pepir amounte to that somme of 280*l.* sterling.

"This is the replicacion of the seid mair and sherefs to the mater allegged by the seid Andrewe ayenst the retourn of the seid mair and sherrefs: the seid mayr and sherrefs seyn that the mater allegged by the seid Andrewe de Vyne ayenst the seid retourn of the seid mair and sherrefs comprehendeth no mater certeyn, ne is sufficient in voydyng of the seid retourn, nor that ther bee noon estatuts ne ordenaunces made by auctorite of ony Parliaments in the tyme of oure Souerayn Lord the Kyng that nowe is, ne of his noble progenitors, Kyng Herry the Fourth, Kyng Richard, or Kyng Edward the Thirde, ne in the tyme of ony other his noble progenitours, whereby power or auctorite is geven to any persone, denisen or alien, to be brocour or mediatour to make bargayn or contracte between marchaunt and marchaunt, ne to occupye the office of brocour or correctour, in other maner and fourme than is expressed and declared in the retourn of the seid mair and sherrefs; and in asmoche as the seid Andrewe hath not withseid the mater conteyned in the seid retourn, ne that he hath exercised and occupied as a comyn brocour and correctour between marchaunt and marchaunt withyn the seid citee and libertees of the same, without warant, ayenst all the statuts and ordenaunces in that partie made and used in the seid citee, the seid mair and sherefs prayen that the seid Andrewe de Vyne may be remytted in affirmaunce of the seid statuts and ordenaunces, and the goode pollitique rule and gouernaunce of the seid citee of long tyme used and accustumed, in avaunce-ment and supportacion of the prosperous course of laufull marchaunts, and in eschewyng of undewe meanes of fals chevesaunces usurie and all other corrupt meanes of false barganyes and contractes.

"Super quo Reverendissimus in Christo Pater et Dominus, Dominus Thomas, Cantuariensis Archiepiscopus, cancellarius Angliæ, convocatis sibi in cancellariam prædictam, super hijs, profundæ discrecionis Viris, Johanne Fortescu, Milite, Capitali Justiciario de Banco Domini Regis; Johanne Prysot, Capitali Justi-

ciario de Communi Banco; Nicholao Aisshton, et cæteris Regis justiciarijs; unâ cum custode rotulorum suorum; coram quibus, vicibus iteratis, returno, responsione, et replicatione prædictis perlectis, et plenius interlectis; auditisque sæpius per eosdem racionibus probis, evidencijs, questionibus, responsionibus, replicationibus et allegacionibus, tam pro parte civitatis, quam pro parte ipsius Andreæ, hinc et inde multipliciter propositis, motis et productis: visis eciam et ostensis ibidem cartis, libertatibus, statutis, recordis, ordinacionibus et provisionibus civitatis, in eâ parte ex antiquo factis et approbatis; habitoque per dictos Dominum cancellarium, justiciarios et custodem rotulorum pluries aviamento et maturâ deliberacione de et super prœmissis:—Ordinatum, decretum, adjudicatum et consideratum fuit per eosdem, auctoritate curiæ prædictæ, quòd prædictus Andreas de Vyne, in plenam allocacionem, affirmacionem, corroboracionem et approbacionem libertatum, statutorem, ordinacionum, et provisionum civitatis prædictæ, in eâ parte factorum, remittatur; Et quod prædicti major et aldermanni hujus-modi libertatibus statutis et ordinacionibus suis plene utantur, sicut hactenus in hujusmodi casu uti consueverunt, etc.

("E Libro Dunthorn, fo. 236 b, et seq.)"

ROSLING v. MUGGERIDGE.

Nov. 28.

ASSUMPSIT by the drawer against the acceptor of two bills of exchange, with counts for goods sold and delivered, and on an account stated.

A plea of payment into Court must be pleaded, in its commencement, to the *further* maintenance of the action: and if it be pleaded to the maintenance of the action generally, this defect is not, upon *special* demurrer, cured by its *concluding* to the further maintenance of the action.

First plea, as to 26*l.* 10*s.* 2*d.* parcel &c., that "the plaintiff *ought not to maintain* his action, because the defendant now brings into Court the sum of 26*l.* 10*s.* 2*d.* ready to be

In assumpsit, the defendant pleaded, that, after the causes of action accrued, the defendant and M., who was jointly liable with him to the plaintiff, became unable to pay their creditors in full; and thereupon it was agreed by the defendant and M., the plaintiff, and the other creditors, that a composition of 4*s.* 6*d.* in the pound should be paid upon their debts, and that, upon receiving that sum, the plaintiff and the other creditors should execute to defendant and M. a general release; that a deed of release was prepared for execution, and that the creditors, except the plaintiff, received the composition, and executed the release; that the defendant has always been ready to pay the plaintiff the composition of 4*s.* 6*d.* in the pound upon his executing the release, of which plaintiff had notice, and was requested by defendant to accept the composition and execute the release:—*Held* bad, for not shewing that the defendant and M. offered to pay the plaintiff the composition-money, or tendered the release to him for execution.

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paid to the plaintiff," denying damages ultra: and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought *further* to maintain his action against him.

Second plea, to the residue, that, after the said causes of action, the defendant and one J. Muggeridge, who was jointly liable with the defendant to the plaintiff in respect of the said monies and causes of action, became unable to pay their creditors in full, and thereupon, at a meeting of their creditors, which was attended by the plaintiff and other creditors, it was agreed by the defendant and J. Muggeridge, and their creditors, by a memorandum in writing, signed by the plaintiff and by the said creditors, that a sum of 4*s.* 6*d.* in the pound upon their respective debts should be paid by the defendant and J. Muggeridge to the plaintiff and the said other creditors; that the defendant and J. Muggeridge should give their acceptances to the plaintiff and their other creditors for a further sum of 6*d.* in the pound upon their respective debts, and upon receiving the said money and acceptances, the plaintiff and the said other creditors should execute to them a general release of all their debts; that a deed of release was duly prepared for execution by the said creditors, and that the said creditors, except the plaintiff, received the said composition and executed the release; that he the defendant hath always, from the time of making the said composition agreement hitherto, been ready and willing to pay the plaintiff the said sum of 4*s.* 6*d.* in the pound in money upon his said debt, and also to give the plaintiff such acceptance as aforesaid, or to pay him the said last-mentioned sum in money upon the plaintiff executing such release as aforesaid, whereof the plaintiff had notice, and was requested by the defendant to accept the said composition and execute the said deed, but that the plaintiff refused so to do, and brought this suit in fraud and violation thereof, in order to recover the full amount of his said alleged debt.—Verification.

Special demurrer to both pleas, alleging for cause, as to the first, that it ought to have been pleaded in bar of the *further* maintenance of the action: as to the second, that the plea was bad for want of an averment that the defendant tendered a release to be executed by the plaintiff.—Joinder in demurrer.

Peacock, in support of the demurrer.—The first plea is bad, for want of a proper commencement. It ought to have been pleaded in bar of the *further* maintenance of the action, according to the form in Reg. Gen. Trin. 1 Vict. It is laid down in Stephen on Pleading (4th edit., p. 422), that "pleadings should have their proper formal commencements and conclusions;" in support of which the author refers to Co. Litt. 303. b., Com. Dig., Pleader, (E), 27, 28, 32. The count is not bound by the conclusion of the plea, but by the part of it which shews to what the defence is applied.

The second plea is also bad for the cause assigned. The agreement was, that the plaintiff should receive a certain sum by way of composition for his debt, and upon receiving it should execute a release. This agreement cannot be a bar to the action, unless every thing has been done whereby the debtors would be entitled to the release. Now there is no statement that they offered to pay the composition to the plaintiff, or that they tendered the release to him to be executed. In ordinary cases, the conveyance must be tendered for execution by the purchaser. Sugden, Vend. and Purchasers, 373, (10th edit.).—He was then stopped by the Court.

Hayes, contrà.—With respect to the first plea, the defective commencement is helped by the good conclusion. The rule is, that "conclusio facit placitum." Mr. Stephen thus lays down the rule (*a*): "In general, a defect or impro-

(*a*) P. 433, 4th edit.

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priety in the commencement or conclusion of a pleading is ground of demurrer. But if the commencement pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the conclusion. And the converse case, as to a right prayer in the conclusion, with an improper commencement, has been decided the same way." This view is supported by the cases of *Street* v. *Hopkinson* (*a*), and *Talbot* v. *Hopwood* (*b*). The former was the case of a bad conclusion, the latter of a bad commencement. [*Alderson*, B.—It does not appear in *Talbot* v. *Hopwood*, whether it was on special or general demurrer. Where there is a defect or impropriety in the pleading, there must be some state in which it is not curable; that is to say, when it is pointed out on special demurrer.] In *Street* v. *Hopkinson*, Lord *Hardwicke* treats the bad conclusion as surplusage; now surplusage is not ground of demurrer, but is rejected altogether. [*Alderson*, B.—You say we are to reject the first part; why not the last?] The bad part is the surplusage.

ALDERSON, B.—The general rule is, that pleadings must have a proper commencement and a proper conclusion. If so, there must be some means of enforcing the rule, and taking advantage of a defect of this nature, which must be by special demurrer. The defendant must therefore amend, or there will be judgment for the plaintiff.

Leave to amend on payment of costs, otherwise

Judgment for the plaintiff.

(*a*) Ca. temp. Hardw. 330. (*b*) Fortescue, 335.

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BOUSFIELD *v.* WILSON. *Nov.* 28.

ASSUMPSIT for money had and received, and on an account stated.

The defendant pleaded, as to 94*l.* 2*s.* 6*d.*, parcel &c., that after the passing of the 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies," and after the 1st of November, 1844, to wit, on &c., the defendant, as the broker and agent of the plaintiff, sold on account of the plaintiff fifteen scrip shares of and in a certain joint-stock company, called the Boston, Newark, and Sheffield Railway Company for the sum of 94*l.* 2*s.* 6*d.*; the formation of which said company was commenced after the 1st of November, 1844, and which, at the time of such sale, was a joint-stock company established in England for profit, and then was and still is a joint-stock company, according to the definition and within the provisions and true intent and meaning of the said act of Parliament, (that is to say), a partnership, whereof the capital was then agreed and intended to be divided into shares, and so as to be transferable without the express consent of all the co-partners therein, and not then being a banking company, school, or scientific or literary institution, or a friendly society, or benefit building society, nor a company incorporated by statute or charter, nor a company authorised by statute or letters patent to sue and be sued in the name of some officer or person; and that the sum of 94*l.* 2*s.* 6*d.*, parcel &c., was so much money received

In an action of assumpsit for money had and received, the defendant pleaded, as to 94*l.* 2*s.* 6*d.*, parcel &c., that, after the passing of the 7 & 8 Vict. c. 110, and after the 1st November, 1844, the defendant, as the broker and agent of the plaintiff, sold on account of the plaintiff fifteen scrip shares in a certain joint-stock company, called the Boston, Newark, and Sheffield Railway Company, for 94*l.* 2*s.* 6*d.*; the formation of which company was commenced after 1st November, 1844, and which, at the time of such sale, was a joint-stock company within the provisions of the said act, that is to say, a partnership whereof the capital was agreed and intended to be divided into shares, &c. &c., and not being a banking company, &c. [negativing the excepted cases mentioned in the enacting part of the 7 & 8 Vict. c. 110, s. 2]; and that the 94*l.* 2*s.* 6*d.* parcel &c., was money received by the defendant as the proceeds of such sale:—*Held* bad, on demurrer, for not shewing that the company was a railway company, the execution of whose works could be carried into effect without the assistance of Parliament, and therefore not within the provision at the end of the 7 & 8 Vict. c. 110, s. 2, which is, in legal effect, an exception.

Semble, that if the sale *had* been illegal, the defendant, the broker who negotiated the sale and received the money, had no right to set up the illegality of the transaction in answer to an action for money had and received, the purchaser not having insisted on such illegality.

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by the defendant for the plaintiff, and at his request, for and as the price and proceeds of the sale by the defendant of such last-mentioned shares, on such sale thereof as aforesaid, and not otherwise, nor on any other account whatsoever; that at the time of such sale, and when the said sum of 94*l.* 2*s.* 6*d.*, parcel &c., was so received by the defendant as aforesaid, the said joint-stock company had not been completely registered, nor had obtained any certificate of complete registration, according to the provisions of the said act in that behalf, and that no authority nor act of Parliament had then been obtained by or on behalf of the said company, for the carrying into execution of any work or works by the said company, or in anywise relating to or authorising the said company, of all which provisions the plaintiff at the time of the said sale, and when the said sum of 94*l.* 2*s.* 6*d.*, parcel &c., was so received by the defendant as aforesaid, had notice, which said sale was and is contrary to the form of the said act of Parliament so made and passed as aforesaid.—Verification.

Special demurrer, assigning for cause (inter alia), that it appears upon the face of the plea, that the joint-stock company therein mentioned was a railway company, for the making of a railway, which could not be carried into execution without obtaining the authority of Parliament; and consequently that the sale of the scrip thereof before complete registration, or before any act of Parliament for authorising the execution of the work or works of the said company had been obtained, was not prohibited or rendered illegal by the act of Parliament in the said plea mentioned.—Joinder in demurrer.

Hayes, in support of the demurrer.—The plea in this case raises the same question as was determined by this Court in the case of *Young* v. *Smith* (*a*), where it was held that a Railway Company, whose works cannot be carried

(*a*) 15 M. & W. 121.

into execution without the authority of Parliament, is not a company the sale of whose scrip before complete registration is forbidden by the stat. 7 & 8 Vict. c. 110. That case has been confirmed by the Court of Queen's Bench, in *Lawton* v. *Hickman* (*a*). But even supposing the contract for the sale of these scrip shares to have been illegal, the defendant, the broker, cannot set up the defence of illegality, which was not set up by the purchaser of the shares. A banker might as well set up the same defence, if the money had been paid into his bank by the purchaser. The claim for money had and received is wholly independent of the previous illegal contract. *Tenant* v. *Elliott* (*b*), and *Farmer* v. *Russell* (*c*), are express authorities to this effect, that if A. receives money to the use of B., on an illegal contract between B. and C., A. cannot set up the illegality of the contract as an answer to A.'s claim for money had and received.

Cowling, contrà.—The authority of *Young* v. *Smith* and *Lawton* v. *Hickman* is not disputed. But it does not appear on the face of this plea, that the company mentioned in it was a company for the execution of a railway requiring the authority of Parliament; and if it be such, that should have been replied; for the clause at the end of the second section of the 7 & 8 Vict. c. 110, is not an *exception*, to be negatived in the plea, but a *proviso*, which ought to be replied by the plaintiff. It is nowhere averred in the plea that this was a Railway Company; it is merely said that it was "a certain joint-stock company *called* 'The Boston, Newark, and Sheffield Railway Company.'" In *Young* v. *Smith*, this point was not brought to the notice of the Court, the parties being desirous of taking their opinion on the main question. The case of *Simpson* v. *Ready* (*d*) is in point to shew the distinction, as to this matter, between a

(*a*) 16 Law J. (N. S.), Q. B. 20.
(*b*) 1 Bos. & P. 3.
(*c*) 1 Bos. & P. 296.
(*d*) 12 M. & W. 736.

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proviso and an exception. [*Platt*, B.—Must you not describe in omnibus the company which you say is an illegal company?] Yes, as regards the enacting part of the statute, but not as to provisoes. [*Alderson*, B.—Every word of your plea may be true, and yet this may be a legal company. You should shew an *illegal* company, which under particular circumstances may be made legal, and then the plaintiff must reply those circumstances.] If so, it comes to this, that the party must always negative the proviso. [*Alderson*, B.—In truth, this is an exception out of the act, though called a proviso. *Simpson* v. *Ready* was a case where an offence was created, but the persons who might sue for it were limited.] In all the cases on this subject which have been decided in the Court of Queen's Bench, the matter of the proviso was replied.

With respect to the other point, the cases cited for the plaintiff are distinguishable. This is not a case of an express promise, but only of a promise implied by law; and the question is whether, under the circumstances stated in the plea, the law will imply a promise to pay over the money. The plea says, that the defendant sold the scrip as the broker and agent of the plaintiff; they were, therefore, both engaged together in an illegal transaction. If the law will imply an obligation to pay over the money obtained by the sale, it thereby gives effect to the illegal transaction. The whole is one connected illegal dealing, and then "in parì delicto potior est conditio possidentis." [*Alderson*, B.—It is a strong proposition to say, that if a party to an illegal contract pays the money without taking the objection of its illegality, the party through whose hands the money goes may raise it. How do you distinguish the cases of *Tenant* v. *Elliot*, and *Farmer* v. *Russell*, from the present?] Those cases appear to be inconsistent with the decisions in *Cannan* v. *Bryce* (*a*) and *Webb* v. *Brooke* (*b*). The policy of the law

(*a*) 3 B. & Ald. 179. (*b*) 3 Taunt. 6.

is to invalidate illegal contracts throughout. [*Alderson*, B. —It is not the policy of the law that he who has another man's money may keep it. In *Simpson* v. *Ready*, there was a general prohibition on all town-councillors to make contracts with the council, but only certain persons were to sue for the penalty. A. brings an action for the penalty; primâ facie he is entitled to do so, and it was for the defendant to shew that he was not. In this case, only certain joint-stock companies are illegal; and it is therefore for the defendant, who pleads the illegality, to shew that it *is* a non-parliamentary railway, and so within the prohibition of the act of Parliament.] In *Farmer* v. *Russell*, the reporter adds a quære, whether the case would be varied if A. were a party to the illegal contract between B. and C. Here the defendant was a party to the contract, being the broker who negotiated it.

Hayes, in reply.—*Webb* v. *Brooke* was the case of a bill of exchange, given expressly to carry out the original illegal bargain. Here the only parties to the original bargain are the buyer and seller of the shares; and the buyer has paid over the money into the defendant's hands, who holds it merely as the agent for the plaintiff, and yet claims to keep it on the score of the illegal bargain. The case is exactly like that of *Tenant* v. *Elliott*. [*Platt*, B.—Was it illegal for the defendant to receive the money? because that was the act on which this action is founded. There is no "par delictum."] No; the argument for the defendant must go to this, that it was illegal to receive money from another person to the use of the plaintiff, because that other person might have refused to pay it by reason of the illegal contract. *Lawton* v. *Hickman* is expressly in point as to the other objection. This is clearly the case of an exception, and not of a proviso. No primâ facie illegality is shewn in the plea.

ALDERSON, B.—The plaintiff is entitled to the judgment

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of the Court. The second section of the 7 & 8 Vict. c. 110 does not create the offence; it is the 26th which creates the illegality. It says, with respect to any joint-stock company, the formation of which shall be commenced after the 1st of November, 1844, that until such joint-stock company shall have obtained a certificate of complete registration, &c., it shall not be lawful for the subscribers to dispose of their shares, and that every contract for the sale or disposal thereof shall be void. Then, looking at section 2, and taking it altogether, the effect is, that the companies mentioned at the end of that section are not within the prohibition of the 26th section. It seems to me that the case is clearly within the authority of *Young* v. *Smith*. Suppose the statute had said, that the regulations as to complete registration should apply to *all* joint-stock companies, not being railway companies requiring the aid of Parliament, surely it would be necessary to state that this was not such a company. With respect to the other point, I do not entertain much difficulty about it, but it is unnecessary to express any opinion upon it.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

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Dec. 5.

GRAHAM and Others *v.* SANDRINELLI.

An affidavit which states only that the deponent has been informed and believes that the defendant is about to leave England, without stating from whom the deponent obtained the information, is not sufficient ground for an order for the defendant's arrest.

Under the 6th section of the 1 & 2 Vict. c. 110, where a judge at chambers has ordered a defendant's arrest, the Court out of which the process issues has power, on application directly made to it, to order his discharge, if it thinks the materials before the judge were insufficient, or that he exercised an improper discretion. Upon such application, the party arrested may use affidavits to explain or contradict those on which the order was granted, and those affidavits may be answered by the plaintiff on shewing cause.

The defendant may also take the opinion of another judge as to the propriety of his discharge, and that opinion is in like manner subject to be reviewed by the Court.

Quære, whether, if the judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the prisoner's discharge, as upon an appeal to the Court.

Quære, also, whether, if it appear on the fresh affidavits that the defendant was about to quit England at the time when those affidavits were made, though he was not when the order for his arrest was made, the Court ought to discharge him.

IN this case a rule had been obtained, calling upon the plaintiffs to shew cause why the defendant should not be discharged out of the custody of the sheriffs of Middlesex. It appeared from the affidavits, that on the 21st of October last, the defendant was held to bail by an order of *Erle*, J., on an affidavit stating that he was indebted to the plaintiffs, as assignees of the estate of certain bankrupts, in the sum of £1900, for money paid to the defendant by the said bankrupts; that the defendant was lately a merchant at Smyrna, in the empire of Austria, and was then in London; and that the following advertisement had appeared in the "Times" newspaper, on the 15th of September last:—

"Edict. The Austrian subject, Giuseppe Quarto Sandrinelli, a native of Trieste, and a merchant domiciled in Smyrna, who hath absconded, and stands accused of the crime of fraudulent bankruptcy, is hereby called upon to present himself, at the least within seventy days, before the Imperial and Royal Consulate General, and to defend himself from the said accusation; with the proviso, that, by virtue of the 459th section of the Penal Code of Austria, a safe conduct may be granted to him on his demand.

"Smyrna, the 1st day of August, 1846.

"The Imperial and Royal Consulate General of Austria.
(Signed) "A. D. MEILANOWICH."

The affidavit then proceeded to state the belief of the de-

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ponent, that the defendant would shortly quit England unless he were forthwith apprehended.

The defendant, on being arrested, applied to *Platt*, B., on affidavits of himself and other persons that he intended to remain in this country, to set aside the order of *Erle*, J., and all subsequent proceedings. The affidavits used on that occasion on the part of the plaintiffs contained no new matter. The learned Judge refused to make any order; whereupon this application was made to the Court, and was supported by further affidavits besides those used at Chambers.

Martin and *Hoggins* shewed cause in Michaelmas Term. —In the first place, the present rule is incorrect in form; it ought to have been a rule to set aside the order of *Platt*, B., not a rule to discharge the defendant. Under the 1 & 2 Vict. c. 110, s. 6, the proper course is for the party arrested to apply in the first instance to a judge, or to the Court, for an order or rule on the plaintiff to shew cause why he should not be discharged out of custody. That was in substance the application here made to *Platt*, B., who, in effect, made an order refusing to discharge the defendant. Then the subsequent jurisdiction of the Court is only to discharge or vary such order made by a judge, on application made to the Court by the party dissatisfied with the order.

Secondly, the defendant is not entitled to apply to the Court at all. The true construction of the 6th section is, that the party arrested can appeal but once. He may apply to another judge, or he may come at once to the Court; but he cannot do both. In this case the defendant has elected to apply to a judge, and has failed in that application. The Court has, therefore, now no jurisdiction to question the propriety of the original order, or to discharge the defendant on new affidavits. [They then proceeded to argue the case on the merits.]

The *Attorney-General*, contrà, contended, that wherever authority was given to a judge at Chambers, it was impliedly given subject to the exercise of it being reviewed by the Court; and that the Court out of which the process issued had always a right, by virtue of their general jurisdiction, to relieve the party against it, if they thought that the judge had allowed the process to issue upon insufficient materials, or had exercised an improper discretion in doing so. He then argued that, in this case, the affidavit on which the defendant was arrested of itself negatived any reasonable inference that the defendant intended to go abroad, inasmuch as the seventy days limited in the edict for his appearance at Smyrna, to answer a criminal charge, had expired before the application for his arrest was made.

Cur. adv. vult.

TALBOT *v.* BULKELEY.

THIS was a rule calling upon the plaintiff to shew cause why an order of *Pollock*, C. B., dated the 11th of August last, should not be rescinded, and why the capias issued in pursuance thereof should not be set aside; and why the sum of 126*l.* 18*s.*, deposited by the defendant with the sheriff of Middlesex, in lieu of special bail, should not be set aside. It appeared from the affidavits, that the defendant was arrested on the 12th of August, by an order of *Pollock*, C. B., dated the 11th. The affidavit on which the order was made stated, on the information and belief of the deponent, certain facts tending to shew that the defendant was about to leave England, but did not state from whom the deponent received the information. On the 17th of August, the defendant applied to the Lord Chief Baron, on an affidavit negativing his intention to leave England, for his discharge. His Lordship refused to make any order,

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and the defendant thereupon deposited with the sheriff the sum of 126*l.* 18*s.* in lieu of special bail, and 10*l.* for costs. In the affidavit filed by him in support of this rule, he swore that he never had any intention of leaving England, as stated in the plaintiff's affidavit. On the part of the plaintiff, in answer to the rule, it was sworn that, on the 7th of November, the deponent called at the defendant's lodgings, and was informed by a female servant there that his goods had been distrained upon for rent on the 20th of October, and that on that day he had given up his apartments and left for the purpose of going to France, and had never been there since that time.

Humfrey shewed cause in Michaelmas Term (*Nov.* 14). —The affidavits now before the Court sufficiently shew that there is reasonable ground to apprehend that the defendant will go abroad, and defeat the plaintiff of his debt, if he be relieved from the effect of the Lord Chief Baron's order; or, indeed, that he is already gone. That being so, the Court will not set the order aside, or direct a return of the deposit: *Gibbons* v. *Spalding* (*a*). But further, this is matter of discretion for the judge at Chambers, and the Court will not question that it was properly exercised. [*Alderson*, B.—The statute expressly gives a power to appeal to the Court. The order is regular, if the judge is satisfied of the fact that the party is about to leave the country; but he must be satisfied of it *by evidence*. Surely the affidavit ought at least to be one on which the deponent may be indicted for perjury. How could he on such an affidavit as this? How can you ever prove that he was not informed of, and did not believe, a particular matter?] There are many cases in which the giving the name of the

(*a*) 11 M. & W. 173.

informant would add nothing to the effect of the affidavit; as in the case of a general officer going to join his regiment, which would be perfectly notorious. [*Rolfe*, B.—In such a case, it would probably be sufficient merely to shew by affidavit that the defendant was that general officer.] At all events, the subsequent affidavits state facts from which it may well be inferred, not only that the defendant is now actually abroad, but also (if that be necessary) that he intended to go abroad at the time when the original order for his arrest was made.

Martin, contrà.—The original affidavit on which the arrest took place was clearly insufficient. Then the question now is, whether it sufficiently appears that, *when he was so arrested*, the defendant had any intention of going abroad. It is in respect of the arrest then made, that the application for his discharge is made. At all events, the question must be determined with reference to the period when the original order was confirmed by the Lord Chief Baron, on the 17th of August. The subsequent facts ought not to be taken into consideration, unless they tend to shew that at that time he intended to go abroad. Now the reason assigned in the present affidavits for his going or intending to go abroad on the 20th of October appears to be the distress *then* made upon his goods. [*Rolfe*, B.—I very much doubt whether the question is, whether he intended to go abroad at the time of the actual arrest. The judge may issue a capias at any time during the progress of the cause, toties quoties; and if the Court be satisfied that the defendant *now* intends to go abroad, it would be absurd to discharge this order, merely to substitute another of the present date.] But the defendant has no opportunity of answering the facts on which that question depends. A new detention must surely be on new affirmative matter, which the defendant has an opportunity of answering.

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The clear meaning of the sixth section of the statute is to give a right of appeal to the Court against the proceeding of the Judge, which proceeding must be founded on the then existing state of things. The right of arrest should be strictly construed, in furtherence of the general object of the act of Parliament. [*Parke*, B.—*Imlay* v. *Ellefsen* (*a*) is an authority in point as to the order of a judge, for holding to bail on a special affidavit, being subject to reviewal by the Court. The difficulty with me is, how we are to order a defendant to be kept in custody, if the materials were insufficient at the time to place him in custody. He ought not to be arrested a second time without a special order to that effect. The rule, nemo debet bis vexari pro eâdem causâ, applies.]

Cur. adv. vult.

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The judgment of the Court in both these cases was now delivered by

PARKE, B.—These cases were argued last term, and stood over that the Court might consider what its powers and duties were under the stat. 1 & 2 Vict. c. 110. Before the statute, any judge of the superior courts might have ordered an arrest in any action, but his orders were subject to review by the Court from which the process issued, as any other orders which an individual judge might make, in the course of the ordinary practice of the court. An instance of such a review occurred in the case of *Imlay* v. *Ellefsen* (*a*); and if the Court should think the order improper, from any defect in the affidavit to hold to bail, or because an improper discretion was exercised by the judge, the Court would have interfered and set it aside.

By the 6th section of the stat. of Vict., the person ar-

(*a*) 2 East, 453.

rested may apply to a judge for an order, or the Court for a rule, to shew cause why he should not be discharged out of custody, and the judge or Court may make an order or rule absolute as prayed, with or without costs, or make such other order thereon as shall seem fit; and there is a proviso that such order made by the judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order.

It is clear, from the terms of this section, that, notwithstanding the judge's order to arrest, the Court from which the process issued, upon an application to it, has a power to discharge; and we think there is nothing in the act to take away the general control previously possessed by the Court over a single judge, if we think the materials before the judge insufficient, or that he exercised an improper discretion, acting in any matters pending in the court; and consequently, where any application is made to us, we may interfere, either by virtue of our general jurisdiction, or that given by the statute; and further, the party arrested may by the statute use affidavits to contradict or explain those on which the order was granted, either by denying the intention to depart, or shewing that the debt was not due; a course which was not permitted by the old practice of the court; and those affidavits may be answered by the plaintiff on shewing cause.

In addition to this power, a right is given to the person arrested to take the opinion of another judge as to the propriety of his discharge; this opinion being again subject to be reviewed by the Court above.

Two questions here arise: 1st, whether, if the judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the prisoner's discharge, as upon an appeal to the Court; and 2ndly, whether, if it should appear on the fresh affidavits that the person arrested was about to quit England at the time the affida-

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vits were made, though it is not clear that he was, or even though it be shewn that he was not, when the order was made, the Court ought to discharge him or his bail, or direct the money deposited instead of bail to be refunded.

We are not all agreed upon these questions, and it is not now necessary for us to decide them, in disposing of the two cases which we have taken time to consider, though the points are of practical importance.

In *Graham* v. *Sandrinelli*, the defendant was arrested for £1900, by order of Mr. Justice *Erle*, which was founded on an affidavit made on the 20th October, stating the debt sufficiently, and that an advertisement had appeared in the "Times," on the 15th of September, of an edict of the Austrian consul at Smyrna, on the 1st of August, stating the defendant to have absconded from Smyrna, and to stand accused of the crime of fraudulent bankruptcy, and calling on him to appear in seventy days, and offering a safe conduct. The affidavit stated no other material fact, and merely added the belief of the deponent that the defendant would shortly quit England unless apprehended. After the defendant was arrested, he applied to my Brother *Platt* to set aside the order to hold to bail and all subsequent proceedings, upon his own affidavits, and those of other persons, as to his intention to remain in England. The learned Judge refused to make the order. The affidavits did not disclose any new matter against the defendant. In the form in which the summons was taken out, my Brother *Platt* was certainly right in not granting an order to the full extent asked, because the writ of ca. sa. certainly ought not to have been set aside. Whether he was right or not in refusing to make an order to discharge only, on this summons is not material *now*, because we are all of opinion that we may consider that my Brother *Erle's* order, and the affidavit in support of it, are before the Court, and that under our general jurisdiction we have a power to give the de-

fendant relief. We all think he was wrong in making an order to arrest upon such an affidavit. It is probable he did not advert to the circumstance that the Austrian order was to appear at Smyrna in seventy days, and that seventy days had expired before the application to him; and whilst they were running, he might have thought that, as an Austrian subject, the defendant would have obeyed the summons, and so gone abroad. The order, therefore, having proceeded upon insufficient grounds, we think that the defendant should be discharged out of custody, and we say nothing respecting the order of Baron *Platt;* but this discharge should be without costs, as there was no untrue statement or concealment of facts on the part of the plaintiff.

The next case is that of *Talbot* v. *Bulkeley*. This case is not pressing, as the defendant is not in custody.

We have carefully perused all the affidavits, and think that if it were not for the matter disclosed on the affidavits used on shewing cause, the defendant would be entitled to have the deposit returned. But those affidavits raise a question, on which the defendant has not had any opportunity of being heard, viz. whether he has not, since the arrest, broken up his establishment and gone to reside abroad; and whether this be the fact the Court wish to ascertain, before they decide on the question whether the deposit ought to be returned. This question must be referred to the Master.

Rules accordingly.

1846.

Dec. 12.

DANIELS *v.* FIELDING and Another.

The only foundation of an action for a malicious arrest under the 1 & 2 Vict. c. 110, is that the plaintiff has obtained the judge's order for the capias by *falsehood* or fraud. The declaration must therefore shew that.

But, *after verdict*, a declaration was held sufficient, which alleged that the defendants, not having any reasonable or probable cause to believe that the plaintiff was about to quit England, *falsely* and maliciously, and without any reasonable or probable cause, caused and *procured* a judge to make an order for a capias against the plaintiff, and falsely &c., by colour of the said order, caused a capias to be sued out thereon, and the plaintiff to be arrested under it.

CASE for a malicious arrest.—The declaration stated, that the defendants heretofore, to wit, on &c., not then having any reasonable or probable cause to believe that the plaintiff was about to quit England, but contriving &c., *falsely* and maliciously, and without any reasonable or probable cause, caused and *procured* Sir *John Patteson*, Knt., one of the justices, &c., to make his certain order in writing in an action of debt then pending, wherein the now defendant, George Fielding, was the plaintiff, and the now plaintiff, Abraham Daniels, was the defendant, whereby he ordered that the now defendant, George Fielding, should be at liberty to issue a writ of capias against the now plaintiff, indorsed to hold the now plaintiff to bail for the sum of 1436*l.* 5*s.*; and thereupon the now defendants, afterwards &c., falsely and maliciously, and without any reasonable or probable cause, caused and procured to be sued out a writ of capias against the now plaintiff, indorsed to hold him to bail for 1436*l.* 5*s.*, and falsely and maliciously, and without any reasonable or probable cause, sued out, by colour of the said order, a writ of capias, directed to the sheriff of Middlesex, commanding him to arrest the plaintiff, until he should give bail in the said action so pending against him, or until he should be otherwise discharged by due course of law. The declaration then averred, that the defendants, pursuant to the order of *Patteson*, J., falsely and maliciously, and without any reasonable or probable cause, caused the writs to be indorsed for 1436*l.* 5*s.*, and, by virtue thereof, falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be arrested by the said sheriff, by virtue of the said writ, and to be kept in custody until he gave bail in £3000 to procure his release; whereas, in truth and in fact, the defendants never had, nor was there at any time, any reasonable or probable cause for believing that the plaintiff

was about to quit England, nor had he any such intention. The declaration then stated, that such proceedings were had in the action, that it was ordered by the Court that Mr. Justice *Patteson's* order should be rescinded, the writ of capias should be set aside, and the bail-bond should be delivered up to be cancelled; and that the defendant, G. Fielding, should pay the costs of and occasioned by the arrest, whereby the plaintiff was actually discharged from the arrest and the proceedings relating thereto.—Plea, Not guilty.

At the trial, before *Pollock*, C. B., at the Middlesex sittings after last Hilary Term, the plaintiff obtained a verdict, damages £5.

In Easter Term, *Martin* obtained a rule calling upon the plaintiff to shew cause why the judgment should not be arrested, on the ground that the declaration was bad, for not alleging the falsehood of the affidavit on which the order of *Patteson*, J., was made.

Jervis and *Humfrey* shewed cause in Trinity Term.—This declaration, though possibly it might be bad on special demurrer, is sufficient after verdict. The contention on the other side is, that it is bad in substance, for omitting to allege the falsehood of the affidavit on which the order for the arrest was made. But it is to be remembered, that the foundation of the action is not the improperly obtaining from the judge an order to arrest the plaintiff, but *the arresting* of him maliciously and without reasonable or probable cause. The judge's order amounts to no more than this, that the plaintiff shall be at liberty to issue a capias; if then he wrongfully avails himself of that permission to make the arrest without reasonable or probable cause, he thereby becomes liable to an action. Possibly it might not be necessary even to state the judge's order in the declaration at all; or, at all events, only in order to shew that the action was properly conceived. [They cited

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Milton v. *Elmore* (*a*), *Gregory* v. *Derby* (*b*), *Biggs* v. *Clay* (*c*), *Saxon* v. *Castle* (*d*), *Elsee* v. *Smith* (*e*).] But, secondly, after verdict, the allegation that the defendants *falsely* and maliciously, and without reasonable or probable cause, *procured* the learned judge to make the order for the arrest, may reasonably and properly be taken to import that the defendants, when making the application to the judge, knew that they had no reasonable or probable cause for the application, and consequently that the affidavit on which they grounded it was false.

Martin and *Cowling*, contrà.—The gist of this action is, the falsely and maliciously, and without reasonable and probable cause, procuring from the judge the order which entitled the defendants to make the arrest; and that is the material part of this declaration. The actual arresting is only in pursuance of the judge's order. The declaration ought, therefore, to have shewn distinctly that the defendants imposed upon the judge by a false affidavit, and so induced him to make the order. It is consistent with all that is distinctly averred in this declaration, that the defendants, in obtaining the judge's order, thought that they had a reasonable and probable cause for applying for it, and that the judge was in error in granting it. The cases cited on the other side all support this view of the case. Even if the defendants did not themselves believe that the plaintiff was about to quit the country, yet if they laid the facts fairly before the judge upon the face of their affidavit, and thereby satisfied *him* that the plaintiff did intend to leave the country, and that a capias ought to issue, they would not be liable to an action; yet such a state of things would satisfy the averment in this declaration, that they falsely pro-

(*a*) 4 C. & P. 456.
(*b*) 8 C. & P. 749.
(*c*) 4 N. & M. 464.
(*d*) 6 Ad. & E. 622.
(*e*) 1 D. & R. 97.

cured the judge to make the order. The whole foundation of the action is, the maliciously laying before the judge a false statement, and so inducing him to act. Under the old process, before the stat. 1 & 2 Vict. c. 110, the Court acted merely ministerially in authorizing an arrest, to which the plaintiff was entitled on his ex-parte affidavit of debt. But since that statute, the order for the arrest is a matter of pure discretion with the judge, to be exercised upon all the facts laid before him; and the plaintiff cannot now be liable to such an action as this, except upon the ground of his having influenced the discretion of the judge by some wilful mis-statement of the facts or suppression of the truth. [*Rolfe*, B.—The question is, whether the allegation that the defendants falsely and maliciously, and without any reasonable or probable cause, caused and procured my Brother *Patteson* to make the order, may not, after verdict, mean that they procured him to do so by false and malicious statements in their affidavits.] The Court will not, even after verdict, put a construction on the words which is out of the natural and ordinary scope of the allegation: *Jackson* v. *Peshed* (*a*). [They also referred to *Johnstone* v. *Sutton* (*b*), *Skinner* v. *Gunton* (*c*), *Savil* v. *Roberts* (*d*), *Chapman* v. *Pickersgill* (*e*), and *Harris* v. *Goodwyn* (*f*).]

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This was an action for maliciously arresting the plaintiff, and holding him to bail for a sum of 1436*l.* 5*s.* At the trial, before the Lord Chief Baron, at the sittings after last Hilary Term, the plaintiff obtained a verdict.

(*a*) 1 M. & Sel. 234.
(*b*) 1 T. R. 544.
(*c*) 1 Saund. 230 *a*.
(*d*) 1 Salk. 13.
(*e*) 2 Wils. 145.
(*f*) 2 Man. & G. 405; 2 Scott, N. R. 459.

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The Court afterwards granted a rule nisi for arresting the judgment, which came on to be argued in last Trinity Term, and we took time to consider our judgment. The declaration states, that the defendants, not having reasonable or probable cause, caused and procured Mr. Justice *Patteson* to make an order, dated the 11th of November, 1845, in an action then pending in the Court of Queen's Bench against the plaintiff, at the suit of the defendants, by which order *Patteson*, J., ordered that the now defendants should be at liberty to issue a writ of capias against the now plaintiff, indorsed to hold him to bail for 1436*l.* 5*s.*; and thereupon the now defendants, falsely and maliciously, and without any reasonable and probable cause, sued out, by colour of the said order, a writ of capias, directed to the sheriff of Middlesex, commanding him to arrest the plaintiff until he should give bail in the said action so then pending against him, or until he should otherwise be discharged by due course of law. The declaration then goes on to aver that the defendants, pursuant to Mr. Justice *Patteson's* order, falsely and maliciously, and without reasonable and probable cause, caused the writ to be indorsed for 1436*l.* 5*s.*, and by virtue thereof, falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be arrested by the said sheriff, by virtue of the said writ, and to be kept in custody till he gave bail in £3000 to procure his release; whereas in truth and in fact the defendants never had, nor was there at any time, any reasonable or probable cause for believing that the plaintiff was about to quit England, nor had he any such intention. The declaration then goes on to state, that such proceedings were had in the action, that it was ordered that Mr. Justice *Patteson's* order should be rescinded, and the writ of capias should be set aside, and the bail-bond should be delivered up to be cancelled; and that the defendant, G. Fielding, should pay the costs of and occasioned by the arrest, whereby the plaintiff was wholly discharged from the arrest and the proceed-

ings relating thereto. In order to decide on the validity of this declaration after verdict, it will be convenient to consider, first, what the law was before the stat. 1 & 2 Vict. c. 110, abolishing arrest on mesne process; and, secondly, how the law has been affected by that statute, so far as relates to actions for malicious arrests.

The arrest before the statute was, in an action for debt, the mere act of the plaintiff himself, and on making the requisite affidavit that the defendant was indebted to him in a sum of £20 and upwards, the plaintiff obtained his writ of capias or latitat as a matter of course. Nothing was required in order to entitle the plaintiff to such a writ, but the affidavit of debt, the truth of which the defendant had, in that state of the proceedings, no means of ascertaining. The defendant was then, so far as the arrest was concerned, entirely at the mercy of the plaintiff. If the plaintiff fraudulently made affidavit of a debt which did not exist, he thereby, without the intervention of any other authority, caused an injury to the defendant, and it followed as a necessary consequence, that if in the result of an action in which the defendant had been arrested, it turned out that the debt sworn to was not due, the defendant had a right of action against the plaintiff for injury caused to him directly by the wrongful act of the plaintiff. Such being the state of the law before the passing of the 1 & 2 Vict. c. 110, the declaration for a malicious arrest merely stated that the defendant, not having reasonable or probable cause of action against the plaintiff to the amount for which he afterwards caused him to be arrested, maliciously sued out a *capias*, and without reasonable or probable cause procured the same to be indorsed in the sum of £——, and caused the same to be delivered to the sheriff, and without reasonable or probable cause caused the sheriff to arrest the plaintiff. The declaration then proceeded to aver the prosecution and termination of the action in which the plaintiff had been arrested, and that in the result it turned out that

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the sum for which he had been arrested was not due, and the injury arising from that arrest, together with the consequential damages, if any, set forth in the declaration, constituted the ground of action.

By the 1 & 2 Vict., c. 110, a great change was made in the law relative to arrest on mesne process, and by consequence in the nature of the action for a malicious arrest. By the first section of the statute, arrest on mesne process is abolished, but then by section 3 it is enacted, that if a plaintiff shall, by the affidavit of himself or of some other person, shew to the satisfaction of a judge that he has a cause of action against the defendant to the amount of £20 or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge, by special order, to direct that the defendant may be held to bail for such sums as the judge may think fit, not exceeding the amount of the debt; and therefore the plaintiff may sue out a writ of *capias*, according to the form given in a schedule to the act. By section 4, the sheriff is directed to arrest the defendant on such writ of *capias*, who is to remain in custody until he has given bail, or made a deposit to secure the debt and costs, as he might have done under the former statute. Section 5 enacts, that this order for arrest may be made at any stage of the proceedings; and section 6 enables the party arrested to apply to any judge or to the Court for a rule or order on the plaintiff to shew cause why he should not be discharged out of custody; and the judge or Court may make such order thereon as may seem just, provided that any such order made by a judge may be discharged or varied by the Court. This very important alteration in the law has of necessity materially altered the nature of the action for a malicious arrest. The foundation on which such an action must now rest is, that the party obtaining the *capias* has imposed on the judge by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him,

not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. But how will it be if, without any such fraud or falsehood, a plaintiff, upon an affidavit fairly stating the facts, succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest the defendant, even though he may not himself believe that the defendant does intend to leave the country? If, indeed, the party arrested had not such intention, he has the power, under section 6, of making a substantive application to a judge or to the Court, praying to be discharged out of custody; and this will be done as matter of course, if the party arrested succeeds in satisfying the judge or Court that he has not nor ever had the intention imputed to him. But such discharge affords no ground of action against the party at whose instance the party discharged has been held to bail, provided only that the original order of the Judge has been fairly obtained.

It is essential, under the present statute, that the plaintiff in an action for a malicious arrest should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the judge has been misled. Now the declaration in this case contains no such statement, and indeed seems throughout to be framed on the erroneous notion, that the gist of the action is the arresting by the defendants, at a time when they had no reasonable or probable cause for believing that the plaintiff was going abroad. This, as we have already explained, is an error. But the question is not whether this declaration would be good on special demurrer, but whether it is good *after verdict;* and though it is certainly very informal, yet we think that, after verdict,

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fact that H. Whitaker was the attorney employed in Lord Kensington's business sufficiently appeared in the attestation. *Hibbert* v. *Barton* (*a*) and *Elkington* v. *Holland* (*b*), which had been relied on against the sufficiency of the attestation, are distinguished by the Court in its judgment. [*Alderson*, B.—In *Lewis* v. *Lord Kensington*, the attestation clause declares that Whitaker subscribed himself to be Lord Kensington's attorney, which is stronger than any words here used.] In this case it could not be necessary for Balden to declare more than once that he was attorney for the defendant. Were he not such attorney, no attestation he could make could stand. In *Hibbert* v. *Barton*, the cognovit was witnessed by W. P., "as the attorney" of the defendant, without having previously shewn that he was his attorney, or that he attested or subscribed the execution as such attorney. In *Todd* v. *Gompertz* (*c*), decided in the case of a prisoner under like words in Reg. Gen. Hil., 2 W. 4, No. 72, now superseded, the following attestation, "witness Henry King, attorney for the defendant at his request," was held good.

Prentice, in support of the rule.—In *Hibbert* v. *Barton*, *Parke*, B., expressed his opinion to be in favour of adhering to the words of the act. Now the act requires not only that the attorney shall declare himself attorney for the party executing, but also that he shall state that he subscribes his name as such attorney for him. If compliance with one of these requirements is held to be equivalent, compliance with both of the clauses of the act will in truth be disregarded.—He was then heard on the merits.

POLLOCK, C. B.—This case, as far as regards the attesta-

(*a*) 10 M. & W. 678.
(*b*) 9 M. & W. 359.
(*c*) 6 Dowl. P. C. 296. See, on the same rule, *Fisher* v. *Papanicolas*, 2 C. &. M. 215; 4 Tyr. 44.

tion of the cognovit, is ruled by *Lewis* v. *Lord Kensington*. The attestation required by the act consists of only two things: viz., a declaration of the witness's being the defendant's attorney, and a statement that he subscribes as such attorney (*a*). The rest is matter which need not be stated; for instance, though the attorney must be on the roll of a superior court, &c., that need not be made part of the attestation. In this case the declaration of being the defendant's attorney occurs in the unnecessary portion of the attestation.

PARKE, B.—I remain of the opinion which I expressed in *Hibbert* v. *Barton*, that in this section the Legislature requires a definite thing to be done, namely, the subscribing of the name of the attorney to the due execution of the instrument, which is directed to be done by a memorandum of attestation, in which he is both to declare himself the attorney of the party executing the instrument, and to state that he subscribes as such attorney. No precise form of words has been rendered necessary for this purpose by the act, and this instrument sufficiently shews that Balden was attorney for the defendant, and subscribed as such.

ALDERSON, B., and ROLFE, B., concurred.

The rule was made absolute on the merits, the defendant undertaking to bring no action, and the cognovit to stand, being well attested.

(*a*) See 10 M. & W. 683.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

HILARY TERM, 10 VICTORIÆ.

Jan. 20.

CHILTON *v.* The LONDON and CROYDON RAILWAY COMPANY.

By 5 Will. 4, c. x., (local), the London and Croydon Railway Company was incorporated. By s. 106, they were authorized to make bye-laws for the good government of their affairs, for regulating their proceedings, and for the management of the undertaking, and of the officers and servants of the Company in all respects, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said Company shall seem meet, not exceeding the sum of £5 for each offence;" such bye-laws to be "binding upon and be observed by all parties," provided they were not repugnant to the laws of England, or the directions of the act. By s. 148, the Company were empowered to make orders for regulating the travelling upon and use of the railway, and for or relating to travellers passing thereon; such orders and regulations to be binding upon such travellers, on pain of forfeiting and paying a sum not exceeding £5, which the Company shall attach to a default. By s. 163, penalties and forfeitures imposed by the *act*, or by any *bye-law*, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices, one half the penalty to go to the informer, and the other half to the Company. By s. 165, any officer or agent of the Company may seize and detain any person whose name and residence should be unknown to such officer or agent who shall commit any offence against the act, and may convey him &c. before a justice without any warrant or other authority than that act. The Company made a bye-law, under their common seal, by which each passenger, not producing or delivering up his ticket on leaving the Company's premises, was required to pay the fare from the place whence the train originally started:—*Held*, that this was not a bye-law imposing a "penalty or forfeiture;" so that the non-production of a ticket on leaving the Company's premises, and the refusal to pay the fare from the place from which the train originally started, did not authorize the arrest of the passenger.

Semble, the only power to apprehend given by sect. 165, is for an offence against the act itself.

Quære, whether the bye-law was reasonable.

TRESPASS.—The declaration alleged, that the defendants assaulted the plaintiff, gave him into custody of a

peace-officer, and caused him to be conveyed in the said custody along divers highways to a police-station, and then caused him to be imprisoned therein for twelve hours, &c.

Plea.—That before and at the time of the committing of the alleged trespass in the declaration mentioned, the said London and Croydon Railway Company had made and constructed a certain railway, with the appurtenances, for the carriage and conveyance, by the said London &c. Company, of passengers from a certain place, to wit, Croydon, to a certain other place, to wit, London, under and by virtue of a certain act of Parliament made and passed in the fifth year of King William the Fourth (reciting the title of this act and of several other acts relating to the Company). And the said defendants further say, that, after the said making the said railway as aforesaid, and after the making and passing of a certain other act of Parliament made and passed in the fourth year of the reign of her now Majesty, intituled "An Act for regulating Railways" (*a*), and long before the day of the committing of the alleged trespasses in the said declaration mentioned, to wit, on &c., the said London &c. Company, under and by virtue and in pursuance of the powers and authorities in that behalf, given to them by the said acts of Parliament in that behalf, duly made and reduced into writing under their common seal, under and by virtue of those acts in that behalf, the following orders and regulations for regulating the travelling upon and use of the said London and Croydon Railway, and the times when the same should be open for use, and for or relating to travellers passing upon the said railway, and for regulating the passing upon, using, or working the said London and Croydon Railway, and other works by the said acts of the said London and Croydon Railway Company in that behalf authorized, or in anywise relating thereto respectively, that is to say:—"No passenger will be allowed to take his seat in or upon any of the Company's carriages, or to travel

(*a*) 3 & 4 Vict. c. 97.

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therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to shew when required by the guard in charge of the train, and to deliver up before leaving the Company's premises, upon demand, to the guard or other servant of the Company duly authorized to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare *from the place whence the train originally started.*" And the said defendants further say, that the said orders or regulations were, in pursuance of the said act of the fourth year of the reign of her now Majesty, to wit, on &c., duly laid before the Lords of the Committee of her now Majesty's Privy Council, appointed for trade and foreign plantations, and that the said Lords, to wit, on the day and year last aforesaid, duly signified to the said London &c. Company their approbation of the said orders and regulations. And the said defendants further say, that before and on the day and at the time of the committing of the said alleged trespasses, the said orders and regulations so approved as aforesaid were printed, published, and painted on boards, and fixed and continued on the fronts and conspicuous parts of the London toll-houses or stations of the said London and Croydon Railway Company hereinafter mentioned, and the several other toll-houses of and belonging to the said London &c. Company, and on all other buildings or places at which any rates or tolls were, during all the time aforesaid, collected or paid under or by virtue of the said act of the said fifth year of the reign of his said Majesty King William the Fourth. And the said defendants further say, that the said orders and regulations were, before and during all the time in the said declaration in that behalf mentioned, and from thence hitherto have been, and still are, and continue to be, sanctioned and approved of by the said Lords of the said Committee of her Majesty's Privy Council, and in full force and effect, and unqualified and unrepealed. And the said defendants further say, that, under and by virtue

of the said acts of Parliament of the said London &c. Company in that behalf, and before and on the day and at the time of the committing the said alleged trespass in the said declaration mentioned, an account or list of the several rates and tolls, and of the toll or fare of 1*s.* 3*d.* hereinafter mentioned, which the said London &c. Company during that time directed and appointed to be taken, and which were payable by virtue of the said act of the fifth year of the reign of his Majesty King William the Fourth, was painted on boards, and affixed to and upon and continued upon the toll-house or station of the said London &c. Company, at London aforesaid, on a conspicuous place there, and in large and legible characters, and also upon every other toll-house and building at which the said rates and tolls by the said acts of the said London &c. Company in that behalf were and are authorized to be collected and received, and on conspicuous parts thereof, and in large and legible characters; and the defendants further say, that, before and on the day and at the time of the committing &c., and from thence hitherto, the said fare or toll, to wit, of 1*s.* 3*d.*, was and is the regular fare directed and appointed to be taken by the said London &c. Company, and payable under and within and by virtue of the said act of Parliament of the fifth year of the reign of his said Majesty, and a proper and reasonable fare, for the conveyance of passengers then or now travelling, or for being conveyed, from the said toll-house or station at Croydon aforesaid to the said toll-house or station at London aforesaid, upon and along or by means of the said London &c. Railway, in and by first-class carriages of and belonging to the said London &c. Company; and the said defendants further say, that the said London &c. Company, before and on the day and at the time of the committing &c., carried and conveyed on and upon and along and by means of the said London &c. Railway, and in and by certain carriages and engines of and belonging to the said London &c. Company respectively, all such passengers as,

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during the time aforesaid, offered themselves to the said London &c. Company for that purpose at and for the rates and fares aforesaid, and subject to the said orders and regulations so approved and sanctioned as aforesaid; and the said defendants further say, that the said London &c. Company, during all the time aforesaid, and for divers, to wit, twenty minutes before the starting of every train of the London &c. Company from every toll-house of the said London &c. Company, and of the particular train hereinafter mentioned, were ready and willing and offered to issue and deliver to the said plaintiff, and to all and every of such passengers as aforesaid, and did, during all the time aforesaid, and do still, issue and deliver to all such passengers as aforesaid who would or will accept, receive, or apply for the same, a certain railway ticket, to wit, a railway ticket describing and directing the particular train, and the class of carriage, and the place or toll-house from which such passenger as aforesaid was or intended or entitled to travel as aforesaid, and the fare paid by such passenger as aforesaid, by and for the purpose of the said ticket's being produced or delivered, upon request as aforesaid, by such passenger as aforesaid, to any servant of the said London and Croydon Railway Company duly authorized in that behalf, under and in compliance with, and by virtue of, the said orders and regulations so made and approved of in that behalf as aforesaid. And the said defendants further say, that, just before the said time in the said declaration mentioned, to wit, on the day and year in the declaration mentioned, a certain railway train of the said London &c. Company, consisting of an engine and divers first-class and other carriages of the said London &c. Company, for the conveyance of passengers thereby, under and by virtue of the said acts of Parliament in that behalf, from Croydon aforesaid to London aforesaid, *originally started* from the said toll-house or station of the said London &c. Company at Croydon aforesaid for London aforesaid, and then proceeded from

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during the time aforesaid, offered themselves to the said London &c. Company for that purpose at and for the rates and fares aforesaid, and subject to the said orders and regulations so approved and sanctioned as aforesaid; and the said defendants further say, that the said London &c. Company, during all the time aforesaid, and for divers, to wit, twenty minutes before the starting of every train of the London &c. Company from every toll-house of the said London &c. Company, and of the particular train hereinafter mentioned, were ready and willing and offered to issue and deliver to the said plaintiff, and to all and every of such passengers as aforesaid, and did, during all the time aforesaid, and do still, issue and deliver to all such passengers as aforesaid who would or will accept, receive, or apply for the same, a certain railway ticket, to wit, a railway ticket describing and directing the particular train, and the class of carriage, and the place or toll-house from which such passenger as aforesaid was or intended or entitled to travel as aforesaid, and the fare paid by such passenger as aforesaid, by and for the purpose of the said ticket's being produced or delivered, upon request as aforesaid, by such passenger as aforesaid, to any servant of the said London and Croydon Railway Company duly authorized in that behalf, under and in compliance with, and by virtue of, the said orders and regulations so made and approved of in that behalf as aforesaid. And the said defendants further say, that, just before the said time in the said declaration mentioned, to wit, on the day and year in the declaration mentioned, a certain railway train of the said London &c. Company, consisting of an engine and divers first-class and other carriages of the said London &c. Company, for the conveyance of passengers thereby, under and by virtue of the said acts of Parliament in that behalf, from Croydon aforesaid to London aforesaid, *originally started* from the said toll-house or station of the said London &c. Company at Croydon aforesaid for London aforesaid, and then proceeded from

the said Croydon toll-house to divers intermediate toll-houses or stations of the said London &c. Company, and then from thence to London aforesaid, along and upon and by means of the said London and Croydon Railway: and the said defendants further say, that the plaintiff became and was a passenger in and by the said train of the London &c. Company in a certain first-class carriage thereof, and was conveyed and travelled upon and along and used the said railway and first-class carriage and engine of the said London &c. Company, as a passenger to the said London toll-house or station of the said London &c. Company; and the said defendants further say, that when the said train arrived, and whilst it continued at the said London toll-house or station of the said London &c. Company, at London aforesaid, to wit, on &c., and just before the committing of the said alleged trespasses, and whilst the said plaintiff, as such passenger as aforesaid, was then occupying the first-class carriage of the said London &c. Company, and before he left the said London &c. Company's premises, one R. G., then and still being the servant of the said Company in that behalf, and duly authorized to collect the said railway tickets on the arrival of the said train at the last-mentioned toll-house or station from the said passengers, demanded and requested of and from the said plaintiff, as such passenger as aforesaid, his said railway ticket, so required to be produced and delivered up as aforesaid; yet the said plaintiff did not nor would, when requested so to do, or at any other time, produce or deliver up to the said R. G. such railway ticket as aforesaid, or any other ticket whatever: and thereupon the said defendant, J. S., then and still being the duly authorized officer and agent of the said London &c. Company in that behalf, then and there requested of him the said plaintiff to pay to him the said defendant, J. S., for and on behalf of the said London &c. Company, the said fare of 1*s.* 3*d.*, being the said reasonable and proper fare from the said toll-

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house at Croydon aforesaid, whence the said train originally started as aforesaid to London aforesaid; but the said plaintiff, although he had during all the time aforesaid had notice of the said several premises, and was then and there shewn a copy of the said orders and regulations, did not nor would produce or deliver up such railway ticket as aforesaid, or any other ticket, or pay the said fare of 1*s.* 3*d.* so payable as aforesaid, when so requested as aforesaid, or at any time before or since; whereupon, and by reason of the premises, and by virtue of the said acts of the said London &c. Company in that behalf, and because the said plaintiff's name and residence was, before and at the said time when &c., unknown to the said defendant, J. S., he the said defendant, J. S., as the officer and duly authorized agent in that behalf of the said London &c. Company, and the said London &c. Company, by and through the said defendant, J. S., as their officer and agent as aforesaid, committed the alleged trespasses in the said declaration mentioned, and not otherwise, as they lawfully might for the cause aforesaid, doing no unnecessary damage and using no unnecessary violence or delay on that occasion.—Verification.

Replication.—The plaintiff says, that, although true it is that at the said time in the said plea in that behalf mentioned he was a passenger in the said first-class carriage in the said plea mentioned, in and by the said train of the said Company in the said plea mentioned, which so originally started from the said toll-house or station of the said Company at Croydon aforesaid, for London aforesaid, as in the said plea mentioned; yet the said plaintiff says, that at the said time when he was such passenger, he was not in or by such train a passenger from the said toll-house or station of the said Company at Croydon aforesaid, and that at the said time he was conveyed in and travelled upon and along the said railway, and used the said railway and the said first-class carriage and engine of the said Company as

in the said plea mentioned, he was not conveyed, nor did he travel upon or along, nor did he use the said railway or the said first-class carriage or engine of the said Company, as a passenger from the said Croydon station or toll-house to the said London toll-house or station; but, on the contrary thereof, the plaintiff says, that at the said time when he was such passenger in such first-class carriage in and by such train, and at the said time when he was so conveyed and travelled upon and used the said railway carriage and engine, he was a passenger by such first-class carriage in and by such train, and was conveyed and travelled upon and used the said railway, from a station or toll-house of the said Company at Sydenham, to the said station or toll-house of the said Company at London, the said station or toll-house at Sydenham being a station or toll-house lying between the said station or toll-house at Croydon and the said station or toll-house at London, and being a station or toll-house less distant than the said station or toll-house at Croydon from the said station or toll-house at London; and the plaintiff says, that, just before the said time when he became such passenger as aforesaid, to wit, on &c., he took his seat in the said first-class carriage at the said station or toll-house of the said Company at Sydenham; and the plaintiff further says, that just before the said time when he so took his seat at the said station or toll-house of the said Company at Sydenham, to wit, on &c., he booked his place, pursuant to the said bye-law in that behalf, as a passenger by a first-class carriage in and by the said train, from the said station or toll-house at Sydenham aforesaid to the said station or toll-house at London; and the plaintiff further says, that, at the said time when he so booked his place, the said Company demanded of him, and he then paid to the said Company, and the said Company then received of him, the sum of 1*s.*, as and for and being his fare for travelling in such first-class carriage from the said station or toll-house at Sydenham to the said station or toll-

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mitting, the trespasses complained of, for or in consequence of the disobedience or non-observance of, or refusal to comply with, such order or regulation; that even if the defendants were justified under the regulations and acts of Parliament in taking the plaintiff before a justice of the peace, the plea does not shew any lawful excuse for the imprisonment in the station-house as charged in the declaration, nor any reason why the plaintiff should not have been taken immediately before a justice of the peace (*a*).

(*a*) 5 Will. 4, cap. x. (local and personal), is entitled "An Act for making a Railway from Croydon to join the London and Greenwich Railway near London."

Sect. 1 incorporates the Company by the name of "The London and Croydon Railway Company."

Sect. 106 enacts, that the said Company, at some general or special general meeting of the said Company, shall have full power and authority, from time to time, to make such bye-laws, orders, and rules, as to them shall seem expedient for the good government of the affairs of the said Company, and for regulating the proceedings and remunerating and reimbursing the expenses of the said directors, and for the management of the said undertaking, and of the officers and servants of the said Company in all respects whatsoever, and from time to time to alter or repeal such bye-laws, orders, and rules, or any of them, and to make others, and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said Company shall seem meet, not exceeding the sum of £5 for any one offence; such fines and forfeitures to be levied and recovered as any penalty may by this act be levied and recovered; which said bye-laws, orders, and rules, being reduced into writing under the common seal of the said Company, and printed and published and painted on boards, shall be hung up and affixed, and continued on the front or other conspicuous parts of the several toll-houses to be erected on the said railway, and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this act, and shall from time to time be renewed as often as the same or any part thereof shall be obliterated or destroyed; and *such bye-laws, orders, and rules, shall be binding upon and be observed by all parties*, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same, provided that such bye-laws, orders, and rules, be not repugnant to the laws of that part of the United Kingdom of Great Britain and Ireland called England, or to any directions in

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stated in the plea is reasonable and valid; and see whether the arrest and imprisonment of the plain therein alleged, are justified.

covering whereof is not herein otherwise particularly directed), may in cases of non-payment thereof be in a summary way, by the order and adjudication of some two or more justices of the peace acting within their jurisdiction, on complaint to them for that purpose made, and afterwards be levied, as well as the costs (if any) of such proceedings, on non-payment, by distress and sale of the goods and chattels of the respective offenders or persons liable to pay the same, by warrant under the hands and seals of such justices; and the overplus (if any) of the monies so raised or recovered, after discharging such penalty or forfeiture, and the costs and expenses as aforesaid, shall be returned on demand to the party whose goods and chattels shall be distrained; all which penalties and forfeitures, not herein directed to be otherwise applied, shall be paid, one moiety to the informer and the remainder to the said Company, for the use and benefit of the said company, unless such penalties or forfeitures shall be incurred by the said Company, in which case the same shall be paid, one moiety to the informer and the remainder to the overseers of the poor of the parish, township, or place within which the offence shall be committed, to be applied by such overseers for the benefit of the poor of such parish, township, or place; and in case such penalties and forfeitures s be forthwith paid, it s lawful for such justices, a are hereby required, to o offender so convicted to tained in safe custody u turn can conveniently l to such warrant of distr less such offender shall g ficient security to the sati of such justices of the p his appearance before su tices, or before some ot tices of the peace havin diction, at such time as appointed for the return warrant of distress, su being not more than eig from the taking of such s and which security any said justices are hereby er ed to take by way of zance or otherwise; but the return of such wa shall appear that no s distress could be had wh to levy the said penaltie feitures, and such costs penses as aforesaid, and t shall not be forthwith pa case it shall appear to t faction of such justices u confession of the offe otherwise, that he hath ficient goods and chattel upon such penalties, for costs, and expenses, c levied if a warrant of should be issued, such shall not be required such warrant of distress, are hereby required, by under their hands and

First, the bye-law is unreasonable and void; for, consistently with it, a traveller on a railway might pay

commit such offender to some common gaol or house of correction for the county or place within their jurisdiction, there to remain for any time not exceeding three calendar months, or until such penalty or forfeiture shall be paid and satisfied, together with all costs and charges attending such proceedings as aforesaid, to be ascertained by such justices, or until such offender shall otherwise be discharged by due course of law.

Sect. 164 enacts, that in all cases in which by this act any penalty or forfeiture is made recoverable by information before any justice of the peace, it shall be lawful for the justice of peace before whom complaint shall be made for any offence committed against this act, or against any bye-law, order, or rule, made in pursuance hereof, to summon before him the party complained against, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed in the recovery of the same, although no information in writing or in print shall have been exhibited before such justice; and all such proceedings by summons, without information in writing or print, shall be as valid and effectual to all intents and purposes as if an information in writing or print had been exhibited.

Sect. 165 enacts, that it shall be lawful for any officer or agent of the said Company, and all such persons as he shall call to his assistance, to seize and detain any person whose name and residence shall be unknown to such officer or agent, who shall commit any offence against this act, and to convey him, with all convenient dispatch, before some justice for the county or place within which such offence shall be committed, without any warrant or other authority than this act; and such justice is hereby empowered and required to proceed immediately to the hearing and determining of the complaint.

Sect. 176 enacts, that, in all cases of prosecution for offences against the bye-laws, orders, or rules of the said Company, the production of a written or printed paper, purporting to be the bye-laws, orders, or rules of the said Company, and authenticated by having the common seal of the Company affixed thereto, shall be evidence of the existence and of the due making of such bye-laws, orders, or rules; and it shall be sufficient to prove that a printed paper or printed board, containing a copy of such of the bye-laws, orders, or rules, as shall subject any person, not being a proprietor of the said Company, to any fine or penalty, hath been affixed and published in manner by this act directed, and, in case of its being afterwards displaced or damaged, hath been replaced

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for a ticket for five miles, and travel that distance onl the knowledge of the Company's officer, yet, if he lo

as soon as conveniently might be, unless proof shall be adduced by the defendant that such printed paper or printed board is not a copy of such bye-laws, orders, or rules, or hath not been duly affixed and generally continued in manner by this act directed.

The 1 Vict. c. xx., intituled "An Act to enable the London and Croydon Railway Company to provide a station and other works in the parish of St. Olave, in the borough of Southwark, in the county of Surrey, and to amend the act relating to the said railway."

Sect. 31 enacts, that the bye-laws, orders, and rules of the said Company made, or hereafter to be made, by virtue of this or the said first-recited act, being reduced into writing under the common seal of the said Company, and printed and published, shall, as to such and so much of the said bye-laws, orders, and rules as shall be of a public nature, and shall relate to or affect other persons than the officers and servants of the said company, be painted on boards, and hung up and affixed, and continued on the front or other conspicuous parts of the several toll-houses to be erected on the said railway and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this or the said recited act [viz. 5 Will. 4], and shall from time to ti renewed as often as the sa any part shall be oblitera destroyed, and such bye orders, and rules shall be ing upon and be observed parties, and shall be suffici all courts of law or equity tify all persons who sha under the same: Provide such bye-laws, orders, and be not repugnant to the l that part of the United Ki of Great Britain and I called England, or to any tions in this or the said act contained; and all suc laws, orders, and rules sh subject to appeal in man the said recited act menti provided always, that no bye-laws, orders, or rules so or any alteration, amendm repeal thereof, shall be vali less the same respectivel have been allowed by th tices of the peace assemb any general or quarter s of the peace for the coun Kent and Surrey, or eit them, or by her Majesty' tices of the courts of Q Bench or Common Pleas, barons of her Majesty' chequer, or by any one or of the said justices or baro

The 2 Vict. c. xviii., in "An Act to amend and e the Powers and Provisions several Acts relating to th don and Croydon Railway.

Sect. 8 enacts, that no

ticket on the way, might be compelled to pay the whole rate chargeable from the furthest terminus of the railway, from which the train originally started, which might be two hundred miles off, and a large sum. Even in this case, the 1*s.* originally paid for five miles' carriage from Sydenham, and the 1*s.* 3*d.* claimed for the longer distance from Croydon, together exceed the 3½d. per mile, which, by sect. 127 of the act, is the utmost the Company can charge each passenger. [*Parke*, B.—The ticket might be stolen from the traveller, without his default, by some fellow-passenger who had not got one.] The record admits that one officer of the Company, namely, the guard who accompanied the train, knew that the plaintiff only came from Sydenham.

law which the said Company may have heretofore made under the authority of the said recited acts (except such as relate solely to the proprietors or directors of the said Company, or any of their officers or servants), shall be valid or binding for a longer period than six months from the passing of this act, nor shall any bye-law (except as aforesaid) which may hereafter be made by the said Company be valid or binding, unless the same shall be allowed by some judge of one of her Majesty's courts of record at Westminster, or by the justices assembled at some general or quarter sessions of the peace, &c.

This provision has been repealed by the Public General Act, 3 & 4 Vict. c. 97, intituled "An Act for regulating Railways." Sect. 7 recites, "That whereas many railway companies are or may hereafter be empowered by an act of Parliament to make bye-laws, orders, rules, or regulations, and to impose penalties for the enforcement thereof upon persons other than the servants of the said companies, and it is expedient that such powers should be under proper control;" and enacts, "that true copies of all such bye-laws, orders, rules, and regulations, made under any such powers by every such company before the passing of this act, certified in such manner as the lords of the said committee of her Majesty's privy council appointed for trade and foreign plantations shall from time to time direct, shall within two calendar months after the passing of this act be laid before the Lords of the said committee, and that every such bye-law, order, rule, or regulation, not so laid before the Lords of the said committee within the aforesaid period, shall from and after that period cease to have any force or effect, saving in so far as any penalty may have been then already incurred under the same."

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The Company might station servants to inspect the passengers' tickets before they get into the carriages; but no bye-law can be reasonable by which, whether the Company knows from whence the passenger has travelled or not, if he does not produce the ticket, he shall be imprisoned. [*Alderson*, B.—Bye-laws, printed on boards, are put up at the stations, stating that officers of the Company are not to take fees. Now if bye-laws thus published are notice to passengers and the public, it does not hurt your argument, for it is important that the public should be acquainted with any penalty or remedy for extortion by an officer.] Again, as sect. 106 of the act of Parliament declares on what subjects bye-laws may be made by the Company, they can only make them under that section, and lose that implied power to make them on other subjects, which they would otherwise have in right of their incorporation. In *Child* v. *Hudson's Bay Company* (*a*), Lord *Macclesfield* says, "A corporation has an implied power to make bye-laws; but where the charter gives the Company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they shall not make bye-laws in any other cases" (*b*). [*Parke*, B.—That may have been a correct decision, but its principle was not adhered to in the House of Lords in *Rex* v. *Westwood* (*c*).] Even if the bye-law be reasonable, the Company's power to make bye-laws is derived from sect. 106 of 5 Will. 4, c. x., but that enactment does not contemplate more than the management of the Company's affairs and servants. Nor does the latter part of it, declaring "that such bye-laws shall be binding upon and observed *by all parties*," mean to impose them on any persons other than the servants of the Company. The object is not to prevent fraud on the pub-

(*a*) 2 P. W., 207.
(*b*) See this passage cited by *Vaughan*, B., 7 Bing. 32.
(*c*) 7 Bing. 1.

lic, but to serve the convenience of the corporation in its local working. Could this bye-law bind strangers, the Company would have power to make, not bye-laws, but general and public laws.

But, secondly, the acts shew, that, supposing the bye-law good, the Company could not imprison for the breach of it, but only for breach of the act. Sect. 163 directs, that "all penalties and forfeitures inflicted or imposed by the *act, or by virtue of any bye-law made in pursuance thereof*, &c. may, in case of non-payment thereof, be recovered in a summary way by order of two or more justices of the peace &c., one moiety of such penalty or forfeiture to be paid to the informer, and the other moiety to the Company," &c. Again, sect. 165 authorizes "any officer or agent of the Company to seize and detain any person, whose name and residence shall be unknown &c., who shall commit any offence *against this act*, and to convey him, with all convenient dispatch, before some justice for the county or place within which such offence shall be committed, without any warrant or other authority than this act." The mere omission to produce a ticket is not committing any "offence against the *act*," though destroying boards, &c. put up by the Company (*a*) would be. Mere acts of omission and offences against bye-laws are only cognizable by a proceeding before justices under sect. 163, which gives half the penalty to the informer, whereas here the Company claim the whole sum of 1*s.* 3*d.* for themselves. [*Parke*, B.—It is admitted on the record, that 1*s.* was paid originally for the ticket, which was afterwards lost.]

Kennedy, for the defendants, in support of the rejoinder. —Three questions arise in this case. First, have the defendants, as a corporation, power to make bye-laws binding on

(*a*) See ante, s. 176 of 5 Will. 4, c. x., and s. 31 of 1 Vict. c. xx.

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strangers? Secondly, if they have, is the bye-law in question reasonable? Thirdly, were the defendants justified in arresting the plaintiff, by either statute or bye-law?

On the first point, sect. 106 of 5 Will. 4, c. x., shews that this Company, being not a private but a public corporation, in whose affairs and management the public at large has an interest, had power to make bye-laws binding not only on its members and servants, but on strangers. By that section, the Company receive "power to make such bye-laws as to them shall seem expedient for the management of the affairs of the Company, and that such bye-laws shall be binding upon and be observed by all parties." Sect. 176 of that act, and sect. 8 of 2 Vict. c. xviii., distinguish between bye-laws affecting the proprietors of this Company and their servants, and bye-laws affecting the public. The inference is, that the Company has power to make laws binding on strangers. By sect. 7 of 3 & 4 Vict. c. 97, a public general act, the legislature considers bye-laws of this kind as affecting the public at large, and therefore requisite to be laid before the Board of Trade. Secondly, the bye-law is reasonable. Unless each passenger is provided with a ticket at the place at which he enters the railway carriage, and is bound to deliver it up on leaving it, great confusion and public inconvenience must prevail. Were the rule otherwise, the servants at each station or terminus must, on each arrival of a train, inquire from each passenger seeking to leave the station, the place from which he has travelled on the line; and a dispute with a single traveller, whether he had come from a neighbouring or remote station, would delay all the rest. [*Alderson*, B.—The bye-law was intended to reach passengers who never had tickets. The check on fraud should be by seeing that those who get into the carriages at the stations have tickets.] Lastly, the sum which the plaintiff was required to pay was not by way of a *fare* for travelling, but of a *penalty* imposed by a bye-law made in pursuance of sect. 106. The implied contract between

the Company and each traveller is, that if he loses his ticket he agrees to pay a fine. [*Parke*, B.—The plea does not state that the plaintiff was taken for the purpose of being taken before a magistrate.] That objection is not open on general demurrer.

PARKE, B.—Any passenger who does not produce a ticket at the end of his journey may have broken his contract with the Railway Company, and be liable to pay the full fare from the most remote terminus. But how is the Company to get that fare? for it certainly is not a "penalty" or "forfeiture" recoverable under sect. 163. Then what "offence against the act" is it, on which sect. 165 can attach, so as to authorize an officer of the Company to take a party before a magistrate? The breach of any bye-law of the Company is not within that section. This bye-law may be insufficient, in not having made a traveller, who does not produce his ticket at the end of his journey, liable to a penalty. But if so, it should be amended and approved by the proper authority. It appears to me that, under this plea, the sum demanded of the plaintiff was a fare, and not a penalty, so that the defendants had no right to seize or detain him.

ALDERSON, B.—I much doubt whether a party can be apprehended under sect. 165, except for offences against the act. But if he can, the sum demanded from the plaintiff was not a penalty, for non-payment of which he was liable to be apprehended. It may be very reasonable to call on a passenger, under these circumstances, to pay the full fare here claimed. The only question here is, how he can be compelled to pay it.

ROLFE, B.—The proceeding to imprison the plaintiff must have been under sects. 163 and 165, because he did not pay 1*s.* 3*d.* But the omission to pay that demand was not an "offence against the act." It may be reasonable to

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insist that the passenger who does not produce his ticket at the end of his journey shall pay the fare charged from the most remote terminus, for no other may be ascertainable by the Company. Pulling down boards set up by the Company under sect. 138, and other injuries to their property, seem to me to be offences against the act, for which parties are liable to be taken before magistrates under sect. 165.

PLATT, B.—No section gives any power of apprehending a party for breach of a bye-law. That power is confined by the legislature to cases where an offence is committed against the act of Parliament, or where that act has itself imposed a penalty.

Judgment for the plaintiff.

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Debt for money lent, and on an account stated. Plea, as to £100, parcel, &c., that after that sum had become due, and before the commencement of this suit, the defendant made his promissory note for the payment to the plaintiff's order of £100, six months after date, and delivered the same note to the plaintiff, who then took and received the same for and on account of the said sum of £100, parcel, &c., and the causes of action in respect thereof:—*Held* bad, on general demurrer, for not averring that the note was still running, or that it had been indorsed over by the plaintiff.

Semble, the plea was not bad for not averring distinctly that the note was *delivered* by the defendant, as well as *accepted* by the plaintiff, for and on account of the debt.

DEBT by the plaintiff as payee, against the defendant as maker, of a promissory note for £100, made on the 21st of November, 1840, and payable at six months' date. There were also counts for money lent, interest, and on an account stated.

Plea, as to £100, parcel of the monies in the second, third, and last counts mentioned; that, after the said sum of £100 had become due, and before the commencement of the suit, to wit, on, &c., the defendant made his promissory note in writing, for the payment to the order of the plaintiff of £100 at six months after date, and delivered the same note to the plaintiff, who then took and received the same for and on account of the said sum of £100,

parcel &c., and the causes of action in respect thereof. —Verification.

Replication, that the said period of six months, specified in the said promissory note in the plea mentioned, expired before the commencement of this suit, and the said note became then and thereupon, and before the commencement of this suit, to wit, on &c., payable according to the tenor and effect thereof, yet the defendant hath not paid the same or any part thereof.

Special demurrer, assigning for causes, that the said replication does not shew that the plaintiff was interested in or entitled to receive payment of, or that he held, the said promissory note in the said plea mentioned, at the time of the commencement of this suit; and that it is consistent therewith that the same promissory note may have been indorsed away, and may be payable to some person other than the plaintiff; and the replication does not shew that the plaintiff was at the commencement of this suit, or is, entitled to receive payment of the said promissory note.—Joinder in demurrer.

The case was argued at the sittings after last Michaelmas Term (Dec. 5), by

Peacock, in support of the demurrer.—This replication is bad, for not shewing that the plaintiff was the holder of the note at the time of the commencement of the suit, or at least that he was ready and willing to deliver up the note to the defendant. [*Parke*, B.—Ought not the plea to have shewn that the bill had been indorsed over to a third person, if the fact be so?] No; it is a fact which is in the plaintiff's knowledge, and not in that of the defendant, whether the plaintiff has negotiated the bill or not. In *Kearslake* v. *Morgan* (*a*), where the defendant, the payee of a promissory note, pleaded to an action for goods sold and delivered, that he indorsed the note to the plaintiff "for

(*a*) 5 T. R. 513.

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and on account of" the debt claimed in the action, this was held to be a sufficient plea, without an averment that the plaintiff had indorsed it over. If the defendant is bound to aver that fact, he is bound also to prove it; yet he may have no knowledge whatever to whom it has been indorsed over. In *Mercer* v. *Cheese* (*a*), the action was for work and labour, to which the defendants pleaded that the promises were made by them jointly with one Morris, and that, before action brought, the plaintiff, "for and on account of" the sums due, and of the promises of the defendants and Morris, drew a bill of exchange on Morris, which Morris accepted and delivered to the plaintiff, who received the same *for and on account of* the said sum, and of the said promises; and this plea was held good, on the ground that it stated a primâ facie defence to the action, and that it was incumbent on the plaintiff to shew by way of replication the fact that the bill was overdue and unpaid in his hands, or that it had been negotiated by him. It is a matter entirely within the plaintiff's knowledge, and he therefore should make some averment to shew that he cannot give up the bill, if the fact be so; or else he should aver that he is ready and willing to give up the note: *Hansard* v. *Robinson* (*b*). [*Platt*, B.—Do you say he should shew that he is ready and willing to give it up at the time of the replication?] At least at the time of action brought. [*Platt*, B.—Suppose he indorsed it away after action brought? *Parke*, B.—Or after replication?] In that case there may be a difficulty; but there it is the defendant's own fault, for putting it in the plaintiff's power to indorse the instrument over after action brought: he should have gone to the plaintiff when he held the note, paid him his debt, and received back the note. [*Platt*, B.—Your plea leaves the note in the plaintiff's hands; then he says by his replication that it is overdue and unpaid: is not that a replication sufficient to

(*a*) 4 Man. & Gr. 804. (*b*) 7 B. & Cr. 90.

defeat *that* plea? If the defendant is to take advantage of the indorsement over of the note by the plaintiff, must not he aver it?] If so, he must prove it; yet it is a fact of which he has no knowledge. The plaintiff's answer to the plea is, that at a certain time he was entitled to sue upon the note, and therefore it was no satisfaction. Then he must shew himself to be the holder of it at the time of action brought, so as to shew a liability on the part of the defendant to pay it *to him*. He cannot sue for the *debt*, unless he has the note. He is not here suing on the note, but for the original debt; he ought, therefore, to shew that he is in a situation to sue upon the note, because the delivery of the note pro tanto is a discharge of the debt, unless the note is in his hands overdue. He ought to shew, not only that it is *unpaid*, but that *he* is entitled to payment of it. The defendant pleads all that he can have knowledge of. Suppose the plaintiff has lost or destroyed the note, he cannot then sue for the original debt: then the defendant might plead that it was indorsed over, whereas the fact might be that the plaintiff had lost it, with a general indorsement upon it. The defendant may have to pay the debt to the plaintiff, and the note and costs also to the holder of it. The plaintiff knows whether he has negotiated the note, or destroyed or lost it. [*Platt*, B.—In *Mercer* v. *Cheese*, the plea consisted of the present plea and replication together, and that was held a good primâ facie answer to the action.] But the Court intimated its opinion that the plaintiff ought to shew that he was the holder of the bill when due. [*Parke*, B.—Looking at what the replication admits in the plea, and at the statements of the replication itself, it states just as much as a plaintiff ever states in a declaration on a promissory note.] But then the plaintiff is here suing for the original debt, and not on the promissory note; and if the defendant is liable to pay the note to the holder, he ought not to be liable also to pay the debt to the plaintiff. If the plaintiff were suing on the note, and

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there were a plea that the defendant did not make it, the plaintiff would have to produce the note on the trial; but in this action the defendant cannot put the plaintiff to the proof of the note, and so the plaintiff may recover the original debt, without producing or proving the note, by collusion with some other person who is the holder of the note, and who may afterwards sue the defendant upon it. The plaintiff ought, therefore, either to say that he was the holder when due, or that he was ready to give up the note on payment of the debt. [*Rolfe*, B.—Suppose he did say that he was the holder, and then, at the trial, he calls J. S., to whom, *after replication*, he indorsed the note for value; how would you be better off? The difficulty you propose to meet by requiring this averment is only thereby shifted a little further. In truth, the defendant is not exposed to any real practical grievance. *Platt*, B.—In actions on bills and notes, the plaintiff is presumed to continue the holder till the instrument becomes due: so here.] There are many cases in which things are presumed to continue, and yet it is necessary to aver them,—as the continuance of a life estate. Here the defendant gives a primâ facie answer, according to *Kearslake* v. *Morgan*.—He referred also to *Huxley* v. *Bull* (*a*) and *Rowe* v. *Young* (*b*).

Wells, contrà.—First, the replication is good; for it discloses a sufficient answer to the primâ facie case set up by the plea. That primâ facie case is merely that the promissory note was given for and on account of the debt claimed in this action. To that the plaintiff replies, that the note is unpaid; and thereupon the right to sue for the debt survives, because the note is only a conditional satisfaction of the debt, if it be paid at the end of the six months: and the defendant breaks that contract by not so paying it. The simple point was, in *Kearslake* v. *Morgan*, and *Mercer*

(*a*) 2 Dowl. & L. 340. (*b*) 2 Brod. & B. 165.

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without alleging that such devisor was of full age;" Stephen on Pleading, 378. Now that is a fact more particularly within the knowledge of the party pleading the devise, yet it is not necessary for him to aver it, because it is not essential to his case. Suppose this point to have arisen on the general issue, before the new rules: the course of the trial would have been for the plaintiff to produce the bill, and to shew it to be unpaid; and it would have been matter of defence for the defendant to shew that it was outstanding in the hands of a third party. In *Fraser* v. *Welch* (*a*), Lord *Abinger*, C. B., says, that a statement that a bill came into the hands of the plaintiff by indorsement, is primâ facie a statement that the plaintiff was the holder of the bill when the action was commenced. *Emblin* v. *Dartnell* (*b*) is to the same effect.

But, secondly, the plea is bad, on the authority of *Crisp* v. *Griffiths*, for not averring that the note was *delivered by the defendant*, as well as that it was *received by the plaintiff*, for and on account of the debt. The words "for and on account of the said sum of £100," &c., are referable only to the immediately preceding statement, that the plaintiff "took and received the same." The plea, therefore, does not shew a contract of both parties whereby the note was a satisfaction of the debt.

Peacock, in reply.—First, as to the replication. The argument on the other side is, that as soon as the bill is overdue and unpaid, the original right of action revives; but that is not so; it only revives if, when overdue, the note is in the hands of the original party. How can the debt revive, merely because the note given on account of it is unpaid *to an indorsee?* The plaintiff cannot have the option to sue for the debt, unless he also has the option to sue upon the note. The remedy is suspended until the

(*a*) 8 M. & W. 629. (*b*) 12 M. & W. 830.

plaintiff is ready and willing to deliver up the note. In *Goldshede* v. *Cottrell*, no question arose on the mode of pleading. In *Mercer* v. *Cheese*, the Court assumed a plea like the present to be a good primâ facie answer, and then said the indorsement over of the bill was a fact within the plaintiff's knowledge, and therefore to be replied by him. [*Parke*, B.—How do you distinguish the plea from that in *Crisp* v. *Griffiths*? It may be that the note was delivered for one purpose, and kept for another.] If a man *accepts* a sum of money or a negotiable instrument in satisfaction of a debt, how can he sue for the original debt? A man *can* only *accept* a thing in satisfaction of a debt, by a bargain with the other party. This objection arises after pleading over, and therefore as upon general demurrer.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued a few days ago, before my brothers *Alderson*, *Rolfe*, *Platt*, and myself, by Mr. *Peacock* and Mr. *Wells*. The pleadings were these. [His Lordship read them.] The principal point argued by Mr. *Peacock* was, that the plea was a good primâ facie answer to the declaration, and that the replication ought to have alleged negatively, that the plaintiff had not indorsed over the note, and further, that he was ready to deliver it up on payment. That the first averment ought to have been made by the plaintiff, because it lay peculiarly in his knowledge whether he had indorsed the note or not, which the defendant could not know; and also that it ought to have averred that the plaintiff had offered to return the note, or was ready to deliver it up on payment, because that was required by the law merchant, as settled by the case of *Hansard* v. *Robinson*. It was answered, that the plea was not primâ facie a sufficient answer, on two grounds: first, that it

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was not properly averred that the note was both *given* and *received* on account of the debt; and, secondly, that the plea was defective, in not stating either that the note was running at the time of the commencement of the suit, or, if not, that it was transferred to a third person. Mr. *Peacock* relied principally on the case of *Mercer* v. *Cheese*, in the Common Pleas, where the Court intimated an opinion that a similar plea was good on a demurrer to it, and that the plaintiff ought to have stated in his replication that the bill still remained in his hands. If that case had been heard to its close, and decided in the way in which some of the judges expressed an opinion, it would have concluded the present case, and we should have acted upon it. But as the counsel for the plaintiff, upon that intimation of opinion, immediately asked leave to amend, which was granted, the case cannot be considered as a binding authority; nor, on the other hand, can the dictum cited in *Crisp* v. *Griffiths*, as to the necessity of further averment in the plea, when the time the bill or note has to run has expired before the commencement of the suit, be entitled to much weight for the plaintiff, as that case also ended in a recommendation to amend, and an amendment accordingly. The case therefore comes before us without any authority binding upon us, precisely in point, and we must determine it in analogy to the principles of previous decisions.

One of the earliest authorities is the dictum of Lord *Kenyon*, in *Stedman* v. *Gooch* (*a*). He said, that "to this effect the law was clear, that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, or (I suppose *and*) default is made in the payment." The case of *Kearslake* v. *Morgan*, (though that case also ended in a recommendation to amend), and that of *Richardson* v. *Rickman*,

(*a*) 1 Esp. 4.

there cited, are two other early authorities on this branch of law, and these cases have, we believe, been constantly acted upon. The delivery and receipt of a negotiable instrument, on account of a debt, is payment by the 3 & 4 Anne, c. 9, s. 7, if the person accepting it does not take his due course, and so obtain payment thereof by endeavouring to get the same accepted and paid. If that instrument is made payable *to a third person*, as in the case of *Richardson* v. *Rickman*, or is made by a third person, as in the case of *Kearslake* v. *Morgan*, the plea, stating the delivery and acceptance of the negotiable instrument, is a sufficient answer in the first instance. If the plaintiff had taken up the bill in the former case, or presented the note at maturity in the latter to the maker, and given due notice of dishonour to the defendant, these facts would have formed the proper subject of a replication. But if the plea state no more than that a negotiable note is given for and on account of the debt, by which the defendant promised to pay the plaintiff, or order, a sum of money, and does not state the note to be still running (which is the case), there seems to us to be no primâ facie answer. The remedy is not suspended at the time of action brought, so that there is no defence on that ground; and, according to the principles of pleading, it is to be intended that the note remains as it was, and that no order was made by the plaintiff for the payment to a third person, as it is not so averred; and therefore, for anything stated in the plea, the note remains over-due in the hands of the plaintiff: so that the suspension of his right of action for the original debt is at an end, and he may recover the amount, no presentment or notice of dishonour being necessary in his case; and therefore such a plea is no answer to the action. In a declaration on a note payable to order, it never is stated that no order was made, but it is presumed that there is none until the defendant pleads it, though it is true in both cases that the fact, whether an indorsement has been made or not, lies more in the plaintiff's knowledge than

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the defendant's. But in the case of a declaration, the rule, that a party is to plead facts within his own knowledge, gives way to the rule that things are to be presumed to continue in the same state till the contrary appears. To make *this* plea, therefore, good, it should be averred that the note was not in the plaintiff's hands, that is, that it was indorsed over before action brought.

It is, however, no such hardship as it has been represented, for the defendant to be called upon to aver an indorsement, and so make out a good plea; for he must find out the indorsee, if there is one, at his peril, when the bill is due, and pay him, as the law does not require notice of indorsement; *Reynolds* v. *Davies* (*a*); and as such averment would not be required in a plea, unless the bill was overdue and unpaid, practically the defendant would always know both of the fact of the indorsement and the name of the indorsee. There is, therefore, no such inconvenience in obliging the defendant to rebut the inference that the note remained in the plaintiff's hands, by shewing the contrary, and so making the plea a good answer to the action. In order to make it such, it must show either a suspension of remedy, by averring that the security is not due, or a transfer of liability, by shewing an indorsement to a third person.

But it is said, that, if the plaintiff declare on the note (when it is admitted he need not aver that it is in his hands), he must, if the plea deny the note, produce it, and so give evidence that, at the time of its production at least, it is his, which affords some security to the defendant against being called on to pay a third person; whereas, if there was an issue on *this* plea, the plaintiff would not be bound to produce the note, and he might oblige the defendant to pay the original debt, and also the note, if indorsed to the indorsee. But then it is also true that the defend-

(*a*) 1 Bos. & P. 625.

ant would be liable to the same inconvenience, though not in the same degree, if the plaintiff had replied as it is said he ought to have done, and averred his readiness to deliver before suit, for he might have indorsed the bill after the commencement of the suit, or even after the replication itself; so that the course of pleading proposed by the defendant would mitigate, not remove, the evil. But no evil will arise if the defendant plead, what he must always practically know, that the note has been indorsed over.

For these reasons we think the plea is bad; and we need not decide whether it is bad on the grounds on which the Court intimated that a plea somewhat similar was bad in the case of *Crisp* v. *Griffiths*,—probably we should hold it good.

Nor need anything be said as to the absence of the averment of readiness to deliver—an averment which is never introduced into any declaration or replication; though the case of *Hansard* v. *Robinson* shews that, in the case of negotiable securities, the party liable is not bound to pay without the production of the security. The case itself was that of a negotiable instrument payable *to bearer*, by reason of an indorsement in blank; but, on referring to the judgment, it appears that it was meant to apply to all cases of negotiable instruments. It does not, however, apply to non-negotiable bills or notes, as was decided by the Court of Queen's Bench in *Wain* v. *Bailey* (*a*).

Judgment for the plaintiff.

(*a*) 10 Ad. & E. 616.

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PRICE *v.* The GREAT WESTERN RAILWAY COMPANY.

The Great Western Railway Company granted to the plaintiffs debenture bonds in the following form:—"By virtue of an act passed, &c., we, the Great Western Railway Company, in consideration of £1000 to us paid by T. P. and W. G., do assign to the said T. P. and W. G. the said undertaking, and all future calls, and all the estate, right, title, and interest of the said company in and to the same, to hold unto the said T. P. and W. G., until the said sum of £1000, together with all interest for the same after the rate of £5 per cent., payable as hereinafter mentioned, shall be fully paid and satisfied; and it is hereby stipulated that the said principal sum of £1000 shall be repayable and repaid on the 15th of January, 1844, and that in the mean time the said company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest-warrants the several sums mentioned in such warrants respectively, at the times specified therein."

In January, 1844, the previous interest having been duly paid, the last of the coupons or interest-warrants was presented, and the interest paid to the plaintiffs; but the company did not then pay the principal, or give notice to the plaintiffs that they were ready to pay it:—*Held*, that the plaintiffs were entitled, in an action of covenant, to recover interest from the 15th of January, 1844, to the time of the payment of the principal.

THIS was an action of covenant upon five several deed-polls or debentures. The defendants paid £5000 into court, and pleaded that the plaintiffs had not sustained any damages beyond that amount. The following case was afterwards, by consent of the parties, stated for the opinion of this Court:—

On the 30th of November, 1838, the above-mentioned Company issued certain debentures or deeds, of which the plaintiffs took to the amount of £5000, and had delivered five several deed-polls or debenture bonds, sealed with the corporate seal of the Company. The following is a copy of one of the deed-polls or debenture bonds:—

"Great Western Railway Company. Debenture Bond, No. 5,729 B., £1000. By virtue of an act of Parliament passed in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled, 'An Act for making a Railroad from Bristol to join the London and Birmingham Railway near London, to be called "The Great Western Railway," with Branches therefrom to the Towns of Bradford and Trowbridge, in the County of Wilts,' We, the Great Western Railway Company, incorporated by and under the said act, in consideration of the sum of £1000, to us in hand paid by Thomas Price, of Cliventhorp, York, Esq., and William Gray, the younger, of the city of York, solicitor, do assign unto the said Thomas Price and William Gray the younger, their executors, ad-

ministrators, and assigns, the said undertaking, and all future calls on the proprietors of the said undertaking, and all and singular the estate, tolls, and sums of money arising by virtue of the said act, and all the estate, right, title, and interest of the said Company in and to the same, to hold unto the said Thomas Price and William Gray the younger, their executors, administrators, and assigns, until the said sum of £1000, together with interest for the same after the rate of £5 for every £100 for a year, payable as hereinafter mentioned, shall be fully paid and satisfied. And it is hereby stipulated, that the said principal sum of £1000 shall be repayable and repaid on the 15th of January, which will be in the year 1844; and that, in the meantime, the said Company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest-warrants hereunto annexed, the several sums mentioned in such warrant respectively, at the times specified therein. Given under our common seal this 30th day of November, 1838."

The following is a copy of one of the coupons or interest warrants annexed to the last-mentioned deed-poll:—

"Great Western Railway Company. Debenture, No. 18. Interest-warrant. pounds, payable 15th of July, 184 . Entered. This warrant will be paid on presentation at the London Office, Princes-street, Bank."

Each of the other deed-polls or debentures, bonds, and coupons, were for the same amount, and in the same form, with the exception of the number. The coupons were duly presented half-yearly as they became due, and the amount duly paid. In January, 1844, the last of the coupons was presented, and the amount duly paid, but the Railway Company did not then pay the principal, nor apprise the plaintiffs, nor any other person on their behalf, that it was ready to be paid, nor give any intimation whatever on

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the subject. No application was made to the Company, nor to any agent on their behalf, by the plaintiffs, for payment of the amount of the said bonds, nor was there any refusal of the defendants to pay the amount thereof. No interest has been paid to the plaintiffs, nor were the principal sums mentioned in the respective deed-polls or debenture bonds, or any part thereof, paid to the plaintiffs before the commencement of this action. The defendants paid into court the principal monies on the several deed-polls or debenture bonds, amounting to £5000, under the plea of payment into court, denying their liability beyond that amount.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in the action interest for the time which elapsed between the 15th of January, 1844, and the time when the defendants paid money into court, or for any portion of such time; and for the purposes of this case, the Court is to have the same powers, if necessary, as a jury would have had. If the Court shall be of opinion in the affirmative, the defendants are to withdraw their plea, and the plaintiffs to be entitled to sign judgment by confession, for such amount and rate of interest as the Court shall think fit. If the Court shall be of a contrary opinion, then judgment as in the case of a nonsuit is to be entered.

Watson, for the plaintiffs, was stopped by the Court, who called upon

Martin, for the defendants.—Two questions arise here: first, what is the liability for interest at common law; and secondly, what is the effect of the stat. 3 & 4 Will. 4, c. 42, s. 28. Now it is submitted, that at common law no interest was recoverable upon a debt, and that it can only be given upon a supposed contract in respect of mercantile debts. There are undoubtedly conflicting dicta on this subject,

and there have been cases at Nisi Prius, where interest has been given upon debts as part of the damages. But the true rule is that laid down by *Holroyd*, J., in *Higgins* v. *Sargent* (*a*) (which was an action of covenant on a policy of insurance), that "unless interest be payable by the consent of the parties, express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances, it is not due by common law." . . . He says further, after referring to several cases to that effect—"Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of *the debt* satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt." And in that case interest was held not to be recoverable. Here, moreover, the rule applies, that "expressum cessare facit tacitum;" the agreement to pay interest up to a certain time excludes a contract to pay it after that time. [*Parke*, B.—That is not quite true: in covenant on a mortgage deed, whereby interest is payable up to a certain time, the mortgagee recovers interest beyond that time.] It is difficult, at all events, to distinguish between a covenant to pay money on the ensuing 1st of January, and a covenant, as in *Higgins* v. *Sargent*, to pay money on the 1st of January after the death of a particular person. [*Platt*, B.—In *Page* v. *Newman* (*b*), Lord *Tenterden* states the rule to be, that interest is not due on money secured by

(*a*) 2 B. & A. 348. (*b*) 9 B. & C. 378.

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a written instrument, unless it appears *on the face of the instrument* that interest was intended to be paid, or unless it be implied from the usage of trade.] *Atkinson* v. *Jones* (*a*) is the only case in which it is expressly stated that, under a mortgage deed whereby interest is payable up to a certain day, interest beyond that day may be recovered as damages. Why should it be so in that case, more than in the case of any other debt payable on a day certain? [*Parke*, B.—Because the deed shews the intention of the parties, that it should be a debt bearing interest. The case of *Higgins* v. *Sargent* differs from the present, because here there is an express contract to pay interest up to a certain day.] How can the Court imply from that a contract to pay it beyond that day? [*Parke*, B.—The jury give it as damages for the detention of the debt. It is not recoverable *as* interest on the contract itself. *Alderson*, B.—Surely there is a great difference between giving interest as damages, on interest-bearing money or the contrary. If the money be employed on interest, it is reasonable to suppose it would continue to be so employed.] It would be reasonable also, on that principle, to give it in every case of money payable on a given day. [*Parke*, B.—And therefore the recent statute has enabled the jury to take an equitable view, and give it wherever there has been a notice demanding payment of interest on a debt payable at a given day.]

PARKE, B.—This is substantially a mortgage. The constant and invariable practice is to give interest by way of damages in such cases: *Dickenson* v. *Harrison* (*b*), *Watkins* v. *Morgan* (*c*). If this were simply the case of a debenture payable on the 1st of January, we should then have to consider whether, under the stat. 3 & 4 Will. 4,

(*a*) 2 Ad. & E. 439.
(*b*) 4 Price, 282.
(*c*) 6 C. & P. 661. See the cases collected, 1 Saund. 201, n. (*n*).

we, as a jury, should give interest; which would depend on what we should think as to the party whose duty it was to move towards the payment of the money. Hereafter, if the Company wish to be free from the payment of accruing interest, they must not only have their money ready on the day mentioned in the debentures, but must give notice to the creditor of their intention to pay. *Strictly*, they must tender the money, but this would not be insisted on. There must be judgment for the plaintiffs.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiffs.

STRUTT *v.* MARY FARLAR.

Jan. 16.

A. having recovered a judgment for £280 against B., agreed with C. to forbear to sue out execution on the judgment until a certain day, in consideration of which C. agreed that he would, on or before that day, erect a substantial house, and cause a lease of it to be granted to A.; such lease, when granted, to be in satisfaction of the judgment. In an action for the breach of this agreement,—*Held*, that the value of the house was the measure of damages, and that such value was properly estimated at the amount of the judgment-debt.

ASSUMPSIT. The declaration stated, that whereas heretofore, to wit, on &c., the plaintiff had recovered, by the judgment of this Court, the sum of 281*l.* 3*s.* 6*d.* against one William Farlar, the plaintiff promised to and agreed with the defendant, that, in consideration of the promise of the defendant thereinafter mentioned, he the plaintiff would forbear to sue out execution against the said William Farlar upon the said judgment until after the 3rd day of December, 1845: and thereupon the defendant promised that he would, on or before the said 3rd day of December, erect and finish a good and substantial house, and would cause to be granted to the plaintiff a lease of the same; and that if the defendant did erect and finish such house before the said 3rd day of December, and cause such lease to be granted, such lease, when granted, should be in full satis-

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faction and discharge of such judgment. The declaration then alleged, that the plaintiff had performed the said agreement on his part, that he was ready to receive the said lease, and that he requested the defendant to build the said house. Breach, that the defendant did not, on or before the said 3rd day of December, build the said house, and cause the said lease to be granted, whereby the plaintiff was likely to lose the amount of the said judgment, &c.

Judgment was signed against the defendant for want of a plea, and a writ of inquiry was executed thereon, before the under-sheriff of Middlesex. Evidence was given on the part of the plaintiff, that the house, if it had been built according to the defendant's agreement, would have been worth from £280 to £300. The under-sheriff directed the jury, that the plaintiff was entitled to recover, by way of damages, the value of that which the defendant had promised to give in consideration of the plaintiff's forbearance to issue execution. The jury gave a verdict for the plaintiff, damages £281.

Udall now moved for a rule to shew cause why there should not be a new assessment of damages, on the ground of misdirection.—The true measure of damages in this case was the difference between the amount of the judgment and the value of the house. [*Parke*, B.—The value of the judgment is £281; therefore that is the amount to be paid, because the defendant has agreed to be responsible for that amount. As soon as the defendant pays the damages, the plaintiff will be bound to enter up satisfaction on the judgment.] It is a contract for the purchase of the judgment. It is as if the agreement were, that on the performance of it on the part of the defendant, the judgment should be assigned to her. It is like a contract for the purchase of land, which is to be completed by a particular day. [*Parke*, B.—It is nothing like a purchase of the debt. The consideration is the forbearance to sue out

execution against the original debtor for a considerable time, in consideration of which the defendant undertakes to pay the debt. She agrees to purchase that favour to the original defendant at the price of the lease of a house; and she has got all that she bargained for as the consideration of the thing she was to do. She must therefore pay the price, and place the plaintiff in the same situation as if she had performed her promise. If it is to be paid in money, she must pay it; if by the delivery of a thing of ascertained value, that value is the measure of damages.] The question is, how much the plaintiff has lost by the non-performance of the contract. [*Parke*, B.—He has lost that which you engaged to give him in performance of the contract.] If the original debtor is solvent, the plaintiff may, notwithstanding this verdict, recover the whole debt against him. [*Parke*, B.—That may be: whether the defendant may get an assignment of the judgment debt in equity, is another matter.]

PER CURIAM (*a*),

Rule refused.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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Jan. 20. BROWN, Public Officer, &c. *v.* BYERS, JEFFRIES, HUXHAM, JAMES, THOMAS, and WILLIAMS

By the deed of association of a mining company, it was provided, that the affairs of the Company should be managed by a committee of seven shareholders, called managing directors; and they were empowered, at their meetings, to vote by proxy; and B. was appointed the resident director or manager, to superintend the mine and the local concerns thereof, hire workmen, provide machinery, &c., but subject to the instructions he might from time to time receive from the managing directors, to whom he was to transmit monthly accounts of the ore raised, wages paid, &c., and a full statement of all debts and liabilities due from the Company; with a proviso that he should not expend or engage the credit of the Company for any sum £50 in any one month, without the express authority in writing of three of the manag tors:—*Held*, that this deed did not authorize B. to draw or accept bills of exchange in of the Company, even for the necessary purposes of the mine, without the express au the managing directors. *Held*, also, that a managing director, who was represented ing of directors by proxy, was not bound by a resolution of the directors present at s ing, authorizing the resident director to accept bills for the Company.

ASSUMPSIT by the plaintiff, as the public o the North and South Wales Bank, against the de as acceptors of three bills of exchange for the 126*l.* 17*s.* 3*d.*, 101*l.* 16*s.* 6*d.*, and 148*l.* 8*s.* 2*d.*, date the 27th June, 25th August, and 3rd Septe the year 1842. The bills were drawn by one Rol berts, payable to his order two months after date, by him to Robert Lloyd, and by Lloyd to the ban partnership, and were accepted by one of the def "R. W. Byers," for the directors of the Llwyndu "Company." The defendant Byers suffered judg default; the other defendants pleaded that they accept the bills.

At the trial, before *Coleridge*, J., at the Summer for the county of Merioneth, 1845, a verdict was t consent for the plaintiff, damages £406, subject to t ion of the Court upon a case which stated in subst follows:—

In the year 1836, a Company was formed un name of the "Llwyndu Mining Company," for t pose of taking on lease and working a certain copp called the Llwyndu Mine, in the counties of M and Carnarvon. By articles of agreement und dated the 27th December, 1839, made between defendants, together with others, it was covenant the parties should become associated as a Company

the name of "The Llwyndu Mining Company," for the purpose of working the said mine as co-adventurers, and that the affairs of the Company should be conducted by a committee of seven shareholders, called managing directors. It was further stipulated that R. W. Byers should be and continue the resident director or manager, to superintend the said mine and the local concerns thereof, and to hire and employ a sufficient number of able and experienced miners and workmen, and provide all needful implements, materials, and machinery, and in all respects to direct and manage the workings of the said mine, according to the reservations, covenants, &c. contained in the lease thereof, and so as most effectually to promote the interests of the said Company, but subject to the instructions he might from time to time receive from the said managing directors, and that once every month he should transmit to the said secretary his accounts, shewing the quantity of ore raised and made ready for sale, the sums paid and expended by him for wages and salaries, and for materials, and otherwise on account of the said mine during the previous month, together with a statement of all debts and liabilities due from the said Company, and a full and correct report of the then state and prospects of the said mine: provided always, that the said R. W. Byers, or other local director for the time being, should not expend or engage the credit of the said Company for any sum exceeding £50 in any one month, without the express authority in writing of three of the said managing directors. The deed contained various stipulations as to the times of the meetings of the directors, the mode of voting, &c., among which was a clause empowering them to vote by proxy; and was executed by all the defendants. The defendants Jeffries, Smith, Huxham, James, and Williams were, at the same meeting, appointed five of the seven managing directors; the defendant Thomas was also appointed a managing director in 1840, on the retirement of one of the two remaining directors; and all these six defendants continued in office until the

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end of the year 1842. The defendant Byers also continu to be the local director until the same period, and he reg larly transmitted to the secretary monthly accounts of l expenditure for wages, materials, &c. in respect of the mir which were called "cost sheets." The average month cost was from £95 to £150. In April, 1842, the affairs the Company became embarrassed, and no remittances we sent to the defendant Byers on account of the expenses the mine. On the 5th of May in that year, Byers appli to the North and South Wales Bank at Portmadoc for advance, for the purpose, as he alleged, of paying tl March cost sheet. The bank, accordingly, discounted f him a bill of exchange, drawn by R. Roberts, and accept by Byers, as resident director, for the directors of the Mini Company. This bill, together with two others drawn a accepted in a like manner, for the payment of the cost shee for the months of April and July, were renewed by Byers their becoming due, and formed the subject of the prese action. During this time Byers had not sufficient funds pay the wages of the men and the other ordinary expens of the mine for the months of March, April, and July, e cept from the proceeds of the above bills, and the sa were necessarily obtained and bonâ fide applied for th purpose. At the time of the above advances, the ba did not know of or make any inquiries respecting the de of settlement, or the extent of the interest of any of tl defendants in the mine. On the 26th of June, on the 23 of July, and on other occasions, Byers informed the secr tary and the committee that he had taken up mon from the bank in payment of the expenses of the min On the 27th of July a special general meeting of tl shareholders was convened, at which all the defendan (except Byers and James) were present, and Byers's con munications were read; when it was resolved to wind u the affairs of the Company, and a copy of the resol tions then passed was transmitted to the defendant Byer On the 26th of October, 1842, the defendant Byers in

formed the secretary by letter that the several bills drawn by him would become due on certain days, and received for answer, that the Company knew nothing of the bills, and that no one was authorized to draw bills or raise money in their names. On the 17th of December, Byers wrote a letter to the committee, in which he stated fully the reasons of his drawing the bills in question, the dates and amounts of the bills, and the mode in which the proceeds had been applied. On the 21st of December, 1842, a special general meeting of the shareholders was held, at which the defendants Huxham, Jeffries, and Smith were present in person, and the defendants James, Thomas, and Williams by proxy. On that occasion Byers's letter of the 17th of December was read, and it was resolved, amongst other things, that the sum of £980 and upwards was due then from the Company; and it being necessary to liquidate the debts immediately, it was the opinion of the meeting that the amount must be provided by the shareholders. The above sum of £980 included the amount of the bills, the subject of this action, the payment of which was the subject of discussion at the meeting.

The above facts having been proved, it was contended on behalf of the defendants, that Byers had no authority to accept the bills in question, or any bills, on behalf of the managing directors, nor could have any such authority by reason of the clause in the deed of settlement, restricting him from engaging the credit of the Company to a greater extent than £50 in any one month.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action upon all or any of the bills of exchange mentioned in the declaration; if the Court should be of opinion that he is, the verdict for the plaintiff is to stand, or to be entered for such sum as the Court shall think fit; if the Court should be of a contrary opinion, a nonsuit is to be entered.

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The *Attorney-General*, for the plaintiff.—There was ample evidence to charge all these defendants, as having expressly authorized the defendant Byers, the local or resident director of this mine, to accept the bills in question. [*Parke*, B.—What evidence is there to fix the defendant James? He was not present at any meeting, but only appeared by proxy.] The deed enables the managing directors to attend and vote by proxy. [*Parke*, B.—But only for purposes within the scope of the deed, which this is not.] That is the question. The deed provides, that the local director "shall not expend, *or engage the credit of the said Company for*, any sum exceeding £50 in any one month," without the express authority in writing of three of the directors. [*Parke*, B.—That is, he may engage the credit of the Company to the extent of £50 for the purposes of the mine.] Surely, then, he is equally authorized to pledge the credit of the Company by borrowing £50 in order to pay the ordinary expenses of the mine, instead of letting every workman have a right of action against the Company for his wages. Besides, he is to send in to the Company monthly statements of the *debts and liabilities* of the Company. That contemplates an authority on his part to impose debts and liabilities upon them. Could he not have bought goods for the mine on credit? If so, why may he not equally obtain credit for the like purposes, by means of the acceptance of a bill of exchange?—He referred to *Tredwen* v. *Bourne* (*a*), *Hawtayne* v. *Bourne* (*b*), and *Hawken* v. *Bourne* (*c*).

Townsend, for the defendant, was not called upon.

PARKE, B.—I am clearly of opinion, that the defendant Byers was not authorized to pledge the credit of the Company by accepting bills of exchange, without express au-

(*a*) 6 M. & W. 461. (*b*) 7 M. & W. 595. (*c*) 8 M. & W. 703.

thority. The *liabilities* spoken of in the deed are those which relate to the price of goods supplied to the mine, or the wages of the workmen. The point is quite settled by the recent cases. Then there is no evidence of express authority to fix all the defendants, because the defendant James was not present at any meeting at which an authority to accept these bills was given or recognised, and therefore is not bound. There must be judgment of nonsuit.

ALDERSON, B., concurred.

ROLFE, B.—There is an important distinction in this case, which ought to be strictly observed. A person who authorizes the manager of the mine to pledge his credit for the purposes of the mine, gives him power to bind him, though absent. That authority, however, is a very limited one, and may be exercised without much danger of fraud or serious injury. But if we are to imply an authority to borrow money from a banker, the banker may advance ten or twenty thousand pounds, and the party may be utterly ruined.

Judgment for the defendants.

HARNETT and Wife *v.* MAITLAND.

Jan. 20.

A declaration in case stated, that the defendant held and occupied a

CASE.—The declaration stated, that whereas the defendant heretofore, to wit, on &c., held and occupied a certain

messuage, &c., as tenant thereof to the plaintiff, under a demise thereof made by the plaintiff to the defendant, by reason of which said tenancy it became and was the duty of the defendant to manage and use the said tenements in a tenant-like and proper manner, and not to permit or commit waste thereto; yet the defendant did not manage and use the said tenements in a tenant-like and proper manner, but on the contrary thereof, wrongfully and unjustly suffered and permitted them to be waste, ruinous, &c. for want of tenantable and necessary repairs:—*Held* bad, on general demurrer, for not shewing that the defendant was more than a tenant at will, who is not liable to an action for *permissive* waste.

Semble, a tenant for years *is* liable, under the statute of Gloucester, 6 Edw. 1, c. 5, to an action for permissive waste.

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messuage, dwelling-house, and premises, as tenant thereof to the plaintiffs, under a demise thereof theretofore made by the plaintiffs to the defendant, the reversion thereof belonging to the plaintiffs; by reason of which said tenancy, it became and was the duty of the defendant, during all the time aforesaid, to manage and use the said tenements in a tenant-like and proper manner, and not to permit or commit waste thereto: yet the defendant did not nor would manage and use the said tenements in a tenant-like and proper manner, but, on the contrary thereof, wrongfully and unjustly *suffered and permitted* the said messuage, dwelling-house, &c. to become, be, and remain, and the same still are, waste, ruinous, and in great decay, for want of tenantable and necessary repairs, and for want of being managed in a tenant-like and proper manner.

Demurrer to so much of the declaration as charges that the defendant did permit waste, and the grievances therein mentioned which were and are permissive waste.—Joinder in demurrer.

The point stated for argument by the defendant was, that under the demise as stated in the declaration, the defendant was not by law liable for permissive waste.

J. Pitt Taylor was heard in support of the demurrer, in last Michaelmas Vacation (Nov. 28).—This declaration discloses nothing from which it can be inferred that the defendant had any greater interest in the demised premises than that of a tenant at will. It states nothing more than the simple relation of landlord and tenant; no period for the duration of the tenancy is stated; no rent is mentioned, and none is alleged to have been paid. And if the statement be defective or ambiguous, that construction is to be adopted which is most unfavourable to the party pleading: Stephen on Pleading, 415, 452. [He referred, on this point, to the 2nd section of the Statute of Frauds, 29 Car. 2,

c. 3, and to *Richardson* v. *Gifford* (*a*).] Now no action for *permissive* waste will lie against a mere tenant at will. *Torriano* v. *Young* (*b*) is an authority that it cannot be maintained even against a tenant from year to year. At common law, no action in the nature of waste lay by landlord against tenant; the right of action is founded on the statutes of Marlebridge and Gloucester: Com. Dig. Waste, (A 2); and these statutes clearly do not apply to the case of a tenant at will. Indeed, it may be doubted whether the words of them include *permissive* waste at all. There are some old authorities that they do: see 2 Roll. Abr. 828; but there are no recent decisions to that effect.

The case stood over until this day, when the Court called upon

Bramwell to support the declaration.—This is a *general* demurrer to a part of the declaration, on the ground of ambiguity, and the declaration is not to be construed so unfavourably against the plaintiff as if it were on special demurrer: *Bevins* v. *Hulme* (*c*). [*Parke*, B.—In order to support it, you must make out that every tenant is liable for permissive waste; but the statute of Gloucester applies only to tenants for life or for years. Every allegation in this declaration might be satisfied by the defendant's being a tenant at will, in the strict sense of the term. *Alderson*, B.—In truth, this is in the nature of a special demurrer; it admits that the words used in the declaration are sufficient to justify the action for commissive waste, but says they are not sufficient to sustain an action for permissive waste.] The declaration may consist with a tenancy at will; and if the defendant says, that for this ambiguity it ought to be read most favourably for him, he ought to have demurred specially: 1 Chit. Plead. 260. This is, in truth, a general demurrer for ambiguity. On general demurrer, or after

(*a*) 1 Ad. & E. 52. (*b*) 6 C. & P. 8. (*c*) 15 M. & W. 97.

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pleading over, the pleading is to be construed in tha sense which will require an answer: *Bevins* v. *Hulme Stead* v. *Poyer* (*a*). In order, therefore, to support thi declaration, it must be taken that the defendant is tenan from year to year, if the words are capable of that con struction. Now the statement in the declaration is no properly a description of a tenancy at will. But, fur ther, assuming that it must be taken to be such, it is no open to the defendant to say, on these pleadings, that ar action for permissive waste will not lie; for, by demurring to the declaration, which states that it became and wa the duty of the defendant to manage the tenements in proper and tenant-like manner, and not to permit waste the defendant has admitted the existence of such a tenanc as entailed upon him that obligation. The proper mode o raising the question was by traversing the holding as tenan on the terms alleged. As the allegation stands, it is merel an inartificial statement of a holding on those terms: *Halli fax* v. *Chambers* (*b*). [*Parke*, B.—It is not an allegatio of a holding on those terms, but a general allegation tha he held as tenant, and that *by reason thereof* it becam his duty not to permit waste. *Platt*, B.—It is a conclusio of law from the allegation of a tenancy.] Thirdly, an ac tion for permissive waste will lie against a tenant from yea to year, who is a tenant for years within the meanin of the statute of Gloucester: 2 Inst. 145; Co. Litt. 56 57. a, n. (1); *Countess of Shrewsbury's Case* (*c*); and th statute extends to every kind of waste, permissive as wel as commissive. There are some cases which appear t be to the contrary, but which, when examined, are not s In *Gibson* v. *Wells* (*d*), the defendant was no more tha tenant at will. In *Herne* v. *Benbow* (*e*), the acts allege

(*a*) 1 C. B. 782.
(*b*) 4 M. & W. 662.
(*c*) 5 Rep. 13 b.
(*d*) 1 N. R. 290.
(*e*) 4 Taunt. 764.

amounted to mere non-repair, which is not equivalent to permissive waste; and the same observation applies to *Jones* v. *Hill* (*a*).

J. P. Taylor, in reply.—This is not matter of form, but of substance; and if so, it is properly raised by general demurrer. It would be perfectly consistent with this declaration, that the defendant was tenant for two days only, one before and one after the marriage of the plaintiffs. The defendant is not said to be possessed for any term; a *tenancy* merely is stated, which the Court cannot infer to be any more than a tenancy at will: *Roe* v. *Lees* (*b*), *Richardson* v. *Langridge* (*c*), *Doe* d. *Hull* v. *Wood* (*d*). This is not *ambiguity*, but *insufficiency* of statement, which is a substantial defect in the pleading.

Secondly, a tenant *from year to year* is not liable for permissive waste. The statutes of Marlebridge and Gloucester have no application to *permissive* waste; the words of the former are "qui facient vastum;" and the latter introduces no new action for waste. The cases, too, all go on the distinction between commissive and permissive waste: see Co. Litt. 57. a, n. (1); *Gibson* v. *Wells*, *Herne* v. *Benbow*, *Jones* v. *Hill*, *Torriano* v. *Young*, *Martin* v. *Gilham* (*e*). [*Parke*, B.—Then do you say that the liability for permissive waste is confined to tenants by the curtesy and tenants in dower? because there is nothing that makes a tenant for life liable for permissive waste but the statute of Gloucester. Your argument is against the authorities in 2 Inst. 145, and 2 Roll. Abr. 828. But upon the other point we are with you.]

PARKE, B.—The difficulty is to call this an *ambiguous*

(*a*) 7 Taunt. 392; 1 Moore, 100.
(*b*) 2 W. Bla. 1172.
(*c*) 4 Taunt. 128.
(*d*) 14 M. & W. 682.
(*e*) 7 Ad. & E. 540.

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statement; it is a *defective* statement. Supposing an actio were brought under the authority of the case of *Ashby* v *White* (*a*), would it be sufficient merely to say that the plain tiff was *tenant* of lands of the value of forty shillings a year The truth is, therefore, that it is not an ambiguous state ment, but no statement at all of one fact which is necessar to render the defendant liable, because it is clear that if h be tenant at will only, he is not liable.

As to the question, whether the action for permissiv waste lies against a tenant for years, all the authorities ar collected in the notes to *Greene* v. *Cole*, in 2 Saund. 252 where it is stated as clear law, that at common law the actio only lay against tenant by the curtesy, tenant in dower, o guardian, but that by the statute of Gloucester, 6 Edw. 1 c. 5, the action is given against lessee for life or years, o tenant pur auter vie, or against the assignee of tenant fo life or years for waste done after the assignment. Th same authorities are referred to in Vol. 1, p. 323 b, where however, it is said that the point cannot yet be considere as absolutely settled (*b*). We are all of opinion, howeve that this declaration is defective on general demurrer, fo not bringing the case within the class of persons who ar liable for permissive waste, for want of an averment that th defendant was tenant for life or years, it being agreed o all hands that a tenant at will is not liable for permissiv waste. On this ground there will be judgment for the de fendant, without saying anything upon the other point.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the defendant.

(*a*) 1 Salk. 19; 2 Lord Raym. 938.

(*b*) See also Vol. 2, p. 252 n. (*b*).

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REES *v.* FRANCIS WATERS and Two Others. *Jan.* 11.

An action of trespass brought in the Court of Exchequer by a plaintiff against three defendants, and all matters in difference between the said parties, were referred by order of nisi prius to an arbitrator, a verdict having been taken for the plaintiff; and by another like order, made at the same time, an action of replevin brought in the Court of Queen's Bench, by the same plaintiff against one only of the defendants, was also referred to the same arbitrator. The main question agitated on both sides was, whether or in both actions.

A RULE had been obtained for setting aside the award of an arbitrator in this case. The action was in trespass, with a plea of not guilty by statute, and was brought for trespasses alleged to have been committed in taking the plaintiff's goods, on the 31st March, 1846, by way of distress for a year's rent alleged to be due on the 25th March, 1846; and it stood in the paper of causes for trial at the last summer assizes for Gloucestershire. Replevin had also been brought in the county court by the plaintiff against Waters only, for the same distress. The proceedings consisted of the usual bond for a return of the goods, precept to replevy, and summons, with delivery of the goods accordingly by the bailiff to the deputy replevin-clerk for the county, on the part of the plaintiff. The defendants having proceeded to sell the plaintiff's goods, notwithstanding the replevin of them in the county court, that suit was abandoned, and the action of trespass was brought and referred as above. An action of replevin in the Court of Queen's Bench had been also brought by the plaintiff against the defendant Francis Waters only, for

not the plaintiff had, in 1842, become tenant to that party who was defendant No other tenancy was ever set up, or brought into question before the arbitrator. The reference of the replevin suit was first proceeded in, and the evidence taken in it was, by consent, read over as evidence in the action of trespass. The arbitrator awarded in the action of replevin, that the plaintiff had good cause of action against the defendant, and was entitled to a verdict. In the action of trespass he awarded nothing as to the costs of the action of replevin, or whether at the date of the order of reference of either action a tenancy of the plaintiff to the party, who was defendant in both actions, existed:—*Held*, that the award was good, these matters, if in difference, not having been brought before the arbitrator at the hearings.

The arbitrator had the power of a judge at nisi prius. He did not award execution, but ordered the damages and costs to be paid at a stated time and place. That part of the award was held void pro tanto, as surplusage.

The plaintiff had replevied in the county court, but on the sale by the three defendants of the goods replevied, dropped that suit, and brought the action of trespass against them:—*Held*, that as the proceeding in the county court was not brought before the arbitrator, his award was good, though he had not awarded on it.

Whether, on a reference of a cause and "all matters in difference between the said parties," they being A., on the one part, and B., C., and D., on the other, an arbitrator must award on a cause and matter of difference pending between A. and B. only, *quære*.

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taking goods in April, 1845, by way of distress for three years' rent alleged to be due to the latter on the 25th March 1845. The avowry was for the rent, with the single plea in bar non tenuit, and the case stood for trial at the same assizes. The defendants in the action of trespass consented to a verdict for the plaintiff for the damages in the declaration, and 40*s.* costs, subject to the award of an arbitrator, to whom "the said cause and all matters in difference between the said parties" were referred, by order of nisi prius, "to order and determine what he should think fit to be done by them respecting the matters in dispute." The costs of the cause were to abide the event and determination of the award, and the costs of the reference and award were to be in the discretion of the arbitrator, who was to have all the powers of a judge at nisi prius. The action of replevin brought in the Court of Queen's Bench between the plaintiff and the defendant Waters only, was also referred at the same time to the same arbitrator, but by a separate order of reference. At the hearings before him, this action of replevin was first proceeded with. The attorney for the avowant stated that he should prove a tenancy of the plaintiff to his client Francis Waters, beginning at Lady-day, 1842, and called witnesses accordingly, but never alleged or proved any other tenancy whatever between the plaintiff and defendant. The plaintiff denied his tenancy to the defendant Francis Waters, and set up a tenancy and payment of rent to his brother William Waters. No award in that action was set forth in terms in the plaintiff's affidavits against this rule, but it was sworn that the arbitrator awarded in that action that the plaintiff had good cause of action against the defendant Francis Waters, and was entitled to a verdict; thus in fact disaffirming the existence of any tenancy of the plaintiff to him, prior to the distress for the rent alleged to be due to the defendant on the 25th March, 1845. The order of reference of the action of trespass was next brought before

the arbitrator, and the plaintiff offered in evidence the proceedings in the replevin suit in the Court of Queen's Bench, in order to shew the three defendants to be trespassers at all events, the plaintiff having been found by the arbitrator not to be tenant to the defendant Francis Waters. The defendant resisted their being received in evidence. No evidence was given of the costs in the replevin suit in the Queen's Bench, and the main question brought before the arbitrator on this hearing was, whether the plaintiff had become tenant to the defendant Francis Waters, in March 1842. On that head no witnesses were examined for the defendants, but both parties agreed that the evidence given on the former reference, which included that of the defendant Francis Waters himself, should be taken into consideration by the arbitrator, as if it had been again given in the action of trespass. It was never alleged for the three defendants that the plaintiff became tenant to the defendant, Francis Waters, at any other time than in March 1842, nor was the arbitrator ever required to state or find whether, at the date of the order of reference in the action of trespass, a tenancy in fact existed between the plaintiff and the defendant Francis Waters. The arbitrator awarded in the action of trespass, that the plaintiff had good cause of action against the defendants in the said cause, and was entitled to a verdict therein, and awarded the damages to be paid by the said defendants to the said plaintiff in that action at the sum of £70, and ordered the damages given by the said verdict, subject to the award, to be altered and reduced accordingly to the said sum of £70; and also that the three defendants should pay that sum on the 20th October, 1846, together with the costs of the action, and also of the reference and award. The award then recited, that whereas the trespasses complained of in the declaration in the action were committed by the defendants under a colour of distress for arrears of rent alleged to be due and owing by

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and from the plaintiff to the defendant Waters, but which the plaintiff wholly denied, the arbitrator awarded that no such rent was or is due from the plaintiff to the defendant Waters, and that the said distress was levied upon the goods and chattels of the said plaintiff wrongfully and illegally. The affidavits in answer to the rule stated, that the actions of replevin and question of tenancy were the matters in dispute between the parties at the time of making the order of reference and the award, and were distinctly brought before the arbitrator, and submitted to him at the hearing before him. Two orders of reference had been drawn up at nisi prius, the second applying to the action of replevin in the Queen's Bench. The rule to set aside the award in the action of trespass had been granted on four grounds:—1st, That the arbitrator had exceeded his authority in awarding costs and damages in the action of trespass to be paid on the day named; 2nd, That he had omitted to award in respect of the proceedings in replevin in the county court; 3rd, That he had omitted to award whether, at the date of the order of reference, a tenancy existed between the plaintiff and the defendant Francis Waters; 4th, That he had omitted to award as to the action of replevin pending in the Court of Queen's Bench between the plaintiff and the defendant Francis Waters.

Talfourd, Serjt., and *Greaves* shewed cause.—At the hearing before the arbitrator, it was in fact agreed that the arbitration should proceed as if there had been one instead of two orders of reference. [*Alderson*, B.—The parties may have agreed that the two awards, being on the same subject matter, should be considered as one award. The order of reference should have referred this action of trespass, and all the matters in difference between the parties, except the action of replevin in the Queen's Bench, and then should have referred that action to the same arbitrator.] The action of replevin in the Queen's Bench was brought

for the same cause of action, and therefore was disposed of by the finding in this award that no rent was due; *Jackson* v. *Yabsley* (a), *Salter* v. *Yates* (b). But even admitting that, on an order of reference of matters in difference between A., B., and C., an arbitrator must award on a matter in difference between A. and B. only, no case like the present can be cited. The question here is, what was meant to be referred to the arbitrator. The two actions were referred at the same time, and it was not intended to refer them singly or separately. Any part of the award which assumes to reserve a power over differences may be rejected, without invalidating the rest; *Manser* v. *Heaver* (c). If the arbitrator has exceeded his authority as to costs, that does not invalidate the award; *Aitcheson* v. *Cargey* (d). The tenancy of the plaintiff to the defendant Francis Waters is disaffirmed by the finding of the arbitrator, that no rent was due. (They were then stopped by the Court.)

Keating, contrà.—The matter in dispute between the plaintiff and one of the defendants should have been adjudicated on specifically in this award. In Comyns' Digest, Arbitrament (D. 4), it is stated, "By a submission by A. and B. of the one part, and C. of the other, *of all matters between them*, an action by A. alone against C. is submitted; for it shall be taken distributively." From 1 Roll. Abr. 246, l. 20, there cited, this appears to have been held on demurrer, in *Arnold* v. *Pole*, Mich. 9 Car. 1. In Watson on Awards, 3rd Edit. 200, the case of *Winter* v. *White* (e) is thus stated: "A cause in which A. was plaintiff and B. defendant was referred by order of nisi prius, and by a subsequent order of reference another cause in which A. was plaintiff and C. defendant

(a) 5 B. & Ald. 848.
(b) 2 M. & W. 67.
(c) 3 B. & Ald. 295.
(d) 2 M. & W. 199; *Hobdell* v. *Miller*, 6 Bing. N. C. 292.
(e) 2 Moore, 723; 1 Brod. & B. 350.

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was included in the former reference. The terms of the reference were of all matters in difference between the parties, or any or either of them, as copartners or otherwise, the costs of the causes and of the reference to abide the event of the award. The arbitrator made two awards, one in the cause between A. and B., and another in the cause between A. and C., but he did not make any award between B. and C., nor did he state whether or not A. had any *joint* cause of action against B. and C. For these objections, especially the last, the Court set aside the award." [*Pollock*, C. B.—This reference is of all matters in difference between the parties, viz. the parties named, and not between those parties *or either of them*. The order of reference between the parties means those parties and no others.] The judgment of *Richardson*, J., in *Winter* v. *White* (*a*), is material: "In cases where A. and B. have jointly entered into a submission of arbitration with C. an award for A. alone to pay money to C. has been objected to, but was holden good by the Court: *Athelstan* v. *Moon* (*b*), *Carter* v. *Carter* (*c*). But the authority which seems to me to come nearest to the present case, is in Brook's Abridgment, tit. Arbitrament, pl. 44. There after citing the Year Book, 2 R. 3, 18, (where it was held by three justices in the Exchequer Chamber, that if J. N. and three others put in award of W. P., all actions and demands between them, the arbitrator has authority to decide all joint matters between them, and all several matters also,) he adds, 'Yet it seems clear that the arbitrator has not authority to determine or arbitrate matters between the three, for they are one party against the fourth; but he may determine between any one of the three and the fourth.' This distinction appears to me (Mr. Justice *Richardson*) to be founded in reason and principle; for otherwise a different effect might be given

(*a*) 1 Brod. & B. 358. (*b*) Com. R. 546. (*c*) 1 Vern. 259

to the submission, and a contract let in different from that into which the parties by their submission entered." [*Alderson*, B.—You must not take this as equivalent to a reference of one cause one day and the other on another; but both causes were referred on the same day, as parts of one reference, though by two orders.] The mere agreement to refer another action cannot affect the arbitrator's duty on this. The order of reference and award in the action of replevin in the Court of Queen's Bench should have been brought before the Court in terms, and not in portions only.

POLLOCK, C. B.—I am of opinion that we ought not to set aside this award. Four objections have been taken to it: first, that the arbitrator has exceeded his power in ordering the costs to be paid on a certain day, and at a certain place. That, however, I consider to be a matter of mere surplusage. The second objection was, that the action or proceeding in the county court has not been determined by the award. As to this, and the fourth objection, which was ejusdem generis, viz. that the action of replevin in the Queen's Bench has not been determined, it is enough to say, that it clearly appears that there was another order of reference of the suit in the Queen's Bench, and that the replevin suit in the county court had been altogether dropped by the parties. The third and main objection was, that the arbitrator has not decided whether a tenancy existed between the plaintiff and one of the defendants. I am of opinion that that matter was not so brought before the arbitrator that even its omission from his award would vitiate it. I am of opinion that a reference of "all matters in difference" does not mean a reference of all possible matters, but of all matters which are brought before the arbitrator. And if the parties omit to solicit his attention to a matter not being one of the questions in the proceedings themselves, no objection can

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be made to the award for not adjudicating on it. I also think that a reference under an order of nisi prius of "all matters in difference between the said parties," involves only matters in difference between all and every of those parties, and does not include matters in difference between some one or other, or any of them. Nor do I think that any authority has been cited which shews the contrary, or that it includes any claim of any one or more of the defendants or plaintiffs. In my view of the subject, a reference so worded would not include the parties on the one side, and any one else on the other, for such matter is not a matter in difference between the plaintiffs and defendants. The cases cited may all be explained by the particular language used in the orders of reference. Where, as in *Winter* v. *White*, the parties agree by their own act, e. g. by bonds, which may be joint and several, the doctrine of the three judges, which is there pushed to an extreme, may be supported; but where, in orders of reference at nisi prius, it has been sought that a separate award, in a matter not affecting all and every of the parties, shall be made, the words "or any or either of them" have always been introduced; and in the absence of those words, I think the order of reference in this case did not cover matters in difference between the plaintiff and only one or more of the defendants. The inconvenience of a contrary doctrine would be very great, as the arbitrator might go on to an award in a suit in which some one or more of the parties to the order of reference had no interest at all. However, I entirely agree that the award ought not to be set aside; because, under the particular circumstances, the replevin suit must be considered as excluded, by the manner in which the parties proceeded before the arbitrator.

PARKE, B.—I agree with the Lord Chief Baron, that this rule must be discharged. As to the first objection

two answers have been given,—first, that the arbitrator had all the powers of a judge, and might have awarded execution; but he has not executed that authority; secondly, that the award, as to the payment of the costs, is merely void: and I agree with that answer. The next question is, as to the proceedings in the county court; and I think the arbitrator ought to have made his award upon that matter, if brought before him. But I do not agree with the Lord Chief Baron as to there being any difference between the act of a court and that of parties in referring matters in difference. Many authorities shew that "between the parties" means between the parties "or any of them." At all events, without looking at the authorities, I should have been disposed to say, that if the proceedings in the county court had been a "matter in difference" in the sense required, the arbitrator should have decided it. But looking at the facts which occurred at the hearing, it is perfectly clear that such was not the case. No evidence of the costs in that case was given, and the reasonable conclusion is, that that matter was not brought forward as a matter of difference between the parties. The principal doubt I have had is, whether, in consequence of the arbitrator's omitting to decide the suit in the Court of Queen's Bench, the award is bad. Two orders of reference were improperly drawn up by the officer, and the question is, whether it was a condition precedent to the validity of this award, that the action in the Court of Queen's Bench should have been disposed of by it. But when I look at the conduct of the parties to this reference, there is ample evidence to show that they meant that action to be disposed of by the other award. That matter was first gone into, and then, when the next case came on, the evidence was read. There is enough to show that, supposing the arbitrator was bound to decide that action in this award, the parties have by their conduct done away with that necessity.

ALDERSON, B.—I am of the same opinion. The award of

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costs is clearly surplusage pro tanto. The second and third points were never specifically brought before the arbitrator. As to the last point, I am not prepared to say that the action of replevin in the Court of Queen's Bench was not a matter in difference, but as the parties by their conduct at the reference have waived the point, they cannot now take the objection.

PLATT, B.—That part of the award which regards the costs is merely excess. With regard to the two next points, I was a good deal impressed by Mr. *Greaves's* argument. This order of reference is merely by the agreement of the parties, and you must therefore look to their conduct before the arbitrators. Now that conduct seems to me to dispose of all the other objections raised against this award. No distinct claim was set up as to the replevin in the county court, whilst, with regard to the tenancy, no one can shut his eyes to the fact that the issue in the replevin suit must decide it, for it goes to the very root of that action. Unless the arbitrator was called on to decide that question as a separate matter in difference, he could hardly be said to be bound to decide it. With regard to the last question, it is idle to say that the conduct of the parties did not take away from the arbitrator the obligation of deciding the question involved in it. If five or six matters more were brought before him, of which some were withdrawn, he would not be bound to decide the latter.

Rule discharged (*a*).

(*a*) See *Stone* v. *Phillips*, 4 Bing. N. C. 37; *Bird* v. *Cooper*, 4 D. P. C. 128; *Dibben* v. *Anglesea* (*Marquis*), 10 Bing. 568; 4 Tyr. 926; *Aitcheson* v. *Carpey*, 2 Bing. 200; *Hayward* v. *Phillips*, 6 Ad. & E. 119.

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Jan. 13.

SMITH v. TEMPERLEY.

The plaintiff sued the defendant for goods sold and delivered, and filed an affidavit of debt in bankruptcy against him, under 5 & 6 Vict. c. 122,

WARREN had obtained a rule, calling on the plaintiff to shew cause why he should not return to the defendant the monies paid by him under an execution against him, with costs, and why a suggestion should not be entered on the record, under 5 & 6 Vict. c. 122, s. 19 (*a*), the bank-

for 104*l.* 18*s.* 5*d.* A summons issued against the defendant under that act, but, on his making affidavit that he believed he had a good defence to the demand, was dismissed by the commissioner. The defendant then pleaded a set-off, and at the trial at the assizes proved it to the amount of 29*l.* 5*s.* Verdict for plaintiff for £74. The judge granted a certificate for speedy execution, and on the 7th of August the plaintiff signed judgment, taxed costs, and issued execution. On the 21st of November a rule was granted under 5 & 6 Vict. c. 122, s. 19, for entering a suggestion on the record, and for compelling the plaintiff to return to the defendant the monies paid by him under the execution, with costs; the ground being, that the plaintiff had no reasonable or probable cause for making the affidavit of debt in bankruptcy:—*Held*, per Curiam, that the motion was made too late; and by three Barons, (*Parke*, B., hæsitante,) that in cases where speedy execution is granted in vacation, under 1 Will. 4, c. 7, and executed before term, the defendant must apply within the first four days of the ensuing term, and, in other cases, before judgment has been signed and execution issued.—*Quære*, whether, under 5 & 6 Vict. c. 122, the plaintiff had reasonable or probable cause for making an affidavit of debt in bankruptcy to the full amount of the defendant's original debt to him?

(*a*) That section enacts, that, in every action brought after the commencement of this act [11th Nov. 1842], wherein any such [see sect. 11] creditor is plaintiff, and any such [see sect. 11] trader is defendant, and wherein the plaintiff shall not recover the amount of the sum for which he shall have filed an affidavit of debt under the provisions of this act, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such Court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the sum shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant, to be taxed as aforesaid, that then the defendant shall be en-

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ruptcy law amendment act, and why the judgment should not be amended. It appeared, from the affidavits produced in support of the rule, that the action was for butcher's meat supplied by the plaintiff to the defendant. The particulars of demand claimed 103*l.* 4*s.* 8½*d.* Before plea, the plaintiff served the defendant with a summons in the form No. 3 given by the schedule of 5 & 6 Vict. c. 122, claiming 104*l.* 18*s.* 5*d.* On the defendant's appearance before the commissioner in bankruptcy, he made an affidavit (under sect. 12) that he verily believed he had a good defence to the claim; and the summons was thereupon dismissed. The defendant then pleaded a set-off for cows sold to the plaintiff. At the trial, at the Surrey Assizes, on the 5th August, 1846, the plea was supported by proof, and the plaintiff had a verdict for £74. A certificate for immediate execution having been granted by the Judge, under 1 Will. 4, c. 7, s. 2, judgment was signed and execution issued on the 7th of August, and the damages and taxed costs were then paid. The rule had been enlarged to this term.

Lush (*Charnock* with him) now shewed cause.—This rule was obtained too late; for the defendant should either have resisted the application for immediate execution at nisi prius, or have obtained a summons at chambers to stay the taxation of costs. [*Parke*, B.—The signing judgment and taxing costs, being the act of the plaintiff, cannot deprive the defendant of the benefit of this motion.] At all events, it should have been made within the first four days of last Michaelmas Term, by analogy to the time prescribed for moving for new trials, in which case, as well before as since 1 Will. 4, c. 7, whether execution be permitted to be

titled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs, so to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant may now by law have execution for costs in other cases.

speedy, or left to the common course of law, a defendant, whose cause is tried in vacation, and who seeks for a new trial, is bound to move for it within the first four days of the ensuing term. That rule was rigidly adhered to before 1 Will. 4, c. 7, particularly after judgment had been signed, and costs taxed. [*Parke*, B., assented (*a*).] Again, before that act the rule was, that motions to deprive a plaintiff of costs, by entering suggestions on the roll that the action should have been brought in a court of requests, must be made within the first four days of the term next ensuing the vacation in which the trial was had. That rule was not altered by 1 Will. 4, c. 7, s. 4, as was held shortly after it passed, in *Baddeley* v. *Oliver* (*b*), a case in which a certificate for speedy execution had issued. [*Parke*, B.—It was also the practice not to make such a motion after the costs were taxed. But is there any case in which such a motion has been refused, on account of its having been made after the first four days of the following term, though judgment had not been signed (*c*)?] No case has been found in which such a motion has been made after that time. *Garratt* v. *Babington* (*d*) supports *Baddeley* v. *Oliver*. *Godson* v. *Lloyd* (*e*) shews that the provisions of 1 Will. 4, c. 7, for speedy execution, are extended to proceedings before the sheriff, under 3 & 4 Will. 4, c. 42, s. 17; so that a motion for entering a suggestion under a court of requests act may be made in term also before taxation of costs, for they form part of the judgment to be signed. [*Pollock*, C. B., mentioned *Rennie* v. *Yorston* (*f*).] *Calvert* v. *Everard* (*g*) shews that after final judgment signed it is too late to move to enter a sugges-

(*a*) See *Watchorn* v. *Cook*, 2 M. & Sel. 348; and *Bligh* v. *Chadwick*, 1 W. W. & H. 315.

(*b*) 1 C. & M. 219; 3 Tyr. 145. See the judgment of *Bayley*, B.

(*c*) See *Bond* v. *Bailey*, 3 Dowl. P. C. 808.

(*d*) 1 Dowl. & L. 820.

(*e*) 4 Dowl. P. C. 157.

(*f*) 8 Dowl. P. C. 326.

(*g*) 5 M. & Sel. 510.

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tion to deprive a plaintiff of costs under a court of reques act; the reason being, that a plaintiff could not be di entitled to his costs under the statute of Gloucester, witho a suggestion being so put on the roll as to form part of t judgment. That could not be done after final judgme signed. *Hippisley* v. *Layng* (*a*) was a motion to deprive plaintiff of costs, by entering a suggestion under a cou of requests act. *Bayley*, J., there said, "The cases *Watchorn* v. *Cook* (*b*) and *Calvert* v. *Everard* do not est blish that a defendant is always in time before final jud ment, but merely decided that he was clearly too late aft judgment." *Unwin* v. *King* (*c*) also shews that a motion t deprive a plaintiff of his costs, under the Middlesex count courts act, must be made before final judgment. This a penal proceeding against the plaintiff, and different fro the application under 43 Geo. 3, c. 46, to deprive the plainti of costs, on account of his having recovered less than h held the defendant to bail for.

The Court here called on

Warren and *Hugh Hill*, in support of the rule.—Th first question is, whether the circumstances of this ca bring it within 5 & 6 Vict. c. 122, s. 19. That is a reme dial provision, affording relief against the sweeping enact ments of the act, and must prevail unless the plaintiff wa clearly entitled to proceed against the defendant in bank ruptcy. As there were items on both sides of the accoun the plaintiff had no reasonable cause for including in h affidavit of debt 29*l.* 4*s.*, the amount of his debt to th defendant, and was only entitled to swear to the balanc *Dronefield* v. *Archer* (*d*). [*Alderson*, B.—Suppose th plaintiff had only brought an action for the balance, an

(*a*) 4 B. & Cr. 863.
(*b*) 2 M. & Sel. 348.
(*c*) 2 Dowl. P. C. 593.
(*d*) 3 B. & Ald. 513.

been sued in a cross-action for the subject matter of set-off, what defence would he have had?] Then the proceedings in bankruptcy for more than the balance were ill founded. The word "balance" means not the debt due to the plaintiff, but the sum for which a plaintiff might properly arrest, notwithstanding the set-off due from him. This proceeding in bankruptcy, therefore, is a different case from that provided for by the 43 Geo. 3, c. 46, of arresting for a larger sum than was afterwards proved to be due; for the act of 5 & 6 Vict. speaks of a plaintiff's affidavit of debt. [*Pollock*, C. B.—It was only for the purposes of arrest that the balance has been called the debt: for as the defendant is not compelled to set off a debt due to him from the plaintiff, the sum originally due from him to the plaintiff is the debt for all other purposes soever. *Alderson*, B.—Under sect. 15 of the act (*a*), the defendant

(*a*) By 5 & 6 Vict. c. 122, s. 15, "If any such trader so summoned as aforesaid shall, upon his appearance, sign an admission for part only of such demand in the form aforesaid, [see Sched. B., No. 1], and shall not make a deposition in the form hereinbefore required, that he believes he has a good defence to the residue of such demand, then and in such case, if such trader, as to the sum so admitted, shall not, within fourteen days next after the filing of such admission, pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit."

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might say before the bankruptcy commissioner, "I will pay the money which is due, viz. so much; and as to the rest, I have a set-off." Or if he refused to admit the debt, and gave security, he would go free altogether from proceedings in bankruptcy. Had such security been given in this case, that might have made it parallel to arresting him for more than was due. *Parke*, B.—Nothing shews the plaintiff's knowledge of the defendant's counter claim on him for cows.] In *Ashton* v. *Naull* (*a*), *Tindal*, C. J., said, "The plaintiff must have known that he was indebted to the defendant in the sum of £39. Under these circumstances, an arrest for the whole amount of the claim which the plaintiff had on the defendant must be considered as without reasonable and probable cause." The Chief Justice then stated *Dronefield* v. *Archer*. *Robinson* v. *Whitehead* (*b*) also supports that case. The analogy between this case and that of arresting without reasonable cause for more than is due on the balance of accounts, is sufficiently close to guide the Court in the present case. The plaintiff should have given credit to the defendant for 29*l.* 5*s.*, the amount of the set-off, and that would have been a defence by way of payment to any action against him for that sum. [*Alderson*, B.—The defendant asks us for costs, on the ground of the plaintiff having no reasonable ground for what he has done, but my present opinion on the schedule of 5 & 6 Vict. c. 122, is, that I should have made an affidavit in the form adopted by the plaintiff, without noticing the matter of set-off (*c*).] In *Higginson* v. *Broadhurst* (*d*), the plaintiff, by his particulars, claimed a balance of 72*l.* 0*s.* 8*d.* and filed an affidavit of debt for that sum, under 5 & 6 Vict. c. 122. The defendant pleaded a set-off, but on a reference to an arbitrator abandoned it. The award was for

(*a*) 2 Dowl. P. C. 727; on 43 Geo. 3, c. 46, s. 3.
(*b*) 6 Dowl. P. C. 292.
(*c*) See 4 Burr. 2134, 2220.
(*d*) 1 Dowl. & L. 490.

the plaintiff for £25 only, but it was held that the defendant was not entitled to costs under sect. 19. *Parke*, B., seems to have intimated, that had not the defendant abandoned his set-off, there would have been want of probable cause, so as to make the result different. [*Alderson*, B.—Unless you could have indicted the plaintiff for perjury, had he sworn to the defendant owing him 103*l.* 4*s.* 8½*d.*, without crediting the defendant for the set-off of 29*l.* 4*s.*, he has sworn truly; so, if the defendant had not chosen to plead a set-off, the plaintiff might have recovered the full amount.]

The other question is, whether this application, having been made within the term next ensuing the trial, was in time. *Watson* v. *Boyes* (*a*) shews that it was. This is a right given by a remedial statute, and may be enforced within a reasonable time. The plaintiff's position was not altered by the time which elapsed after the fourth day of the term and that on which this rule was obtained. In *Bligh* v. *Chadwick* (*b*), the trial was in vacation, but the costs had not been taxed on the fifth day of the ensuing term, on which day a motion to deprive the plaintiff of costs was made, and held in time. [*Alderson*, B.—There nothing was sought to be undone. *Parke*, B.—The plaintiff's position might not have been altered for a year after the trial, but the ensuing term must be the extreme limit of this motion. It cannot be said that the Courts have not a discretion under this act, as well as under 43 Geo. 3, c. 46.]

POLLOCK, C. B.—The first question is, what is the true construction of the 5 & 6 Vict. c. 122, on this subject. It has been said, that we must consider this act altogether as if we were dealing with Lord *Ellenborough's* Act, 43 Geo. 3, c. 46. On this and many other points I have much doubt, and confine my judgment to the point, that the application was

(*a*) 13 M. & W. 635. (*b*) 1 W. W. & H. 315.

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not made in time. On that ground only, this rule must be discharged. Mr. *Hill* admitted, that had this been an ordinary case of a trial at an assizes, the motion would have been too late after the lapse of the first four days of the following term, had judgment been signed and costs taxed in the usual way. But the Judge's order for speedy execution took it out of that class of cases which shew that a party unsuccessful at a trial in vacation must come to the Court before judgment has been signed, viz. within *four first* days of the next term. But the spirit of that order for speedy execution is this: the Judge gives the plaintiff a right to have speedy execution, not conclusively, but subject to the defendant's application to the Court within the first four days of the next term, either for a new trial or in arrest of judgment. The execution in this case, therefore, was not conclusive against being questioned by the defendant within the time I have mentioned. Very shortly after the trial, the defendant had distinct notice, by the plaintiff's taxation of costs, that he was taking steps against him, yet the first four days of term were suffered to elapse without making this application. I agree with my Brother *Alderson's* suggestion, that the defendant is not to have more time for moving to set aside the proceedings, because the Judge's order for granting speedy execution has in fact decided that he shall have less time. Whether that order could limit the time for moving or not, it could not extend it. I think this motion should have been made within the first four days of last Michaelmas Term; and were that doubtful, this defendant, by abstaining from making any application till the nineteenth day of that term, has entirely deprived himself of any right to apply at all. The right to tax costs by the practice of the Court, can only be qualified according to that practice.

PARKE, B.—I agree that the defendant ought to have come promptly to the Court, and, as that has not been done,

I am of opinion that this rule should be discharged. As I find no decision that the motion should be made within the first four days of term, I hesitate upon that point, though it may be desirable to establish it as a rule in future; but at all events he was too late on the 21st of November. I think it improper to throw out suggestions on the construction of the act, as I have doubts upon it.

ALDERSON, B.—I agree that this rule must be discharged. I give no opinion on the construction of this act. On the question of the time for moving, I think that by the general rule the defendant ought to apply before judgment has been signed, and costs taxed. Here those steps have taken place, and execution has issued. That, however, was in vacation, and the defendant could not apply to this Court till long after. But my decision rests on this, that the defendant did not bring his case within the spirit of the act, as he did not apply within the first four days of Michaelmas Term. By 1 Will. 4, c. 7, s. 2, in the case of a certificate for speedy execution, "a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term." Now, had this judgment been in fact signed on the fifth day of last Michaelmas Term, the cases shew that this motion could not have been made afterwards, and this case stands on the same footing, viz. as if the judgment had been signed on the fifth day of term.

PLATT, B.—I concur with my Brother *Alderson*. A motion in arrest of judgment can only be made before that judgment is given, and comes too late after it has been signed, and the costs taxed. This motion must be taken as if made on the fifth day of last term, and were it successful, a defendant against whom speedy execution has been granted, would have greater advantages than if execution

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had been left to its common and less expeditious course. I therefore think, that when speedy execution is granted, such a motion as this must be made within the first four days of the ensuing term, and, in other cases, before judgment signed and execution issued, which is practically the same result.

Rule discharged, with costs.

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Books deposited by the owner with a bookseller, kept by him as part of his general stock, and sold by him on commission, do not, on his bankruptcy, pass to his assignees, as being in his "possession, order, or disposition," as reputed owner within 6 Geo. 4, c. 16, s. 72.

The fact that a party has agreed to sell goods on commission, may be proved by oral evidence, though the terms as to its payment have been reduced into writing.

TROVER for books. Pleas, first, not guilty; second, not possessed. Issues thereon. At the trial, before *Pollock*, C. B., at the sittings at Guildhall after last term, it appeared that the plaintiff was a surgeon, the author of a work called "Tight Lacing and its Consequences;" and the defendant the trade assignee of a bankrupt bookseller, named Cunningham. The action was brought to recover damages for the sale of a number of copies of the plaintiff's work, by order of the defendant, after the bankruptcy. Cunningham, before his bankruptcy, had a bookseller's shop in the Strand, and had received from the plaintiff 1500 copies of his work, to be sold by commission. These copies were placed by him on his premises, among the rest of his stock in trade, without any distinction respecting them; at his bankruptcy he had sold 200 copies, some over the counter and some to other booksellers. A fiat in bankruptcy issued against Cunningham on the 5th November, 1846, and his stock in trade, including the remaining copies of the plaintiff's work, was seized and sold by the defendant's order.

It was shewn to be part of a bookseller's trade to sell books by commission. The bankrupt had objected to the sale of the books by the defendant, saying they were the plaintiff's

property. The plaintiff's counsel asked the bankrupt, first, whether the books were put into his hands as his own, or as the plaintiff's; he said as the plaintiff's. He was then asked whether he had agreed with the plaintiff to sell the work at 10 per cent. commission. He said he had. It was then objected for the defendant, that the terms of the agreement between the plaintiff and defendant for the sale of the books were in writing, viz. in a letter from the bankrupt to the plaintiff, which should be produced. It was not produced.

The defendant's counsel contended, that the books had been in the "possession, order, or disposition" of the bankrupt at the time of his bankruptcy, within 6 Geo. 4, c. 16, s. 72, and had accordingly passed to his assignee, so that the plaintiff ought to be nonsuited. The Lord Chief Baron declined to nonsuit, but gave leave to the defendant to move to enter a nonsuit or a verdict, if necessary. Verdict for the plaintiff.

Bagley now moved pursuant to the leave reserved.—The first question is, whether the parol evidence was properly received; whether there appeared to be evidence in writing of the terms of dealing between plaintiff and the bankrupt. [*Pollock*, C. B.—The objection that the terms of sale had been reduced into writing, was not taken until after the bankrupt had answered the question now objected to. The objection, therefore, came too late. The case resembles that of a tenant, who, though holding under a written agreement not produced, may be asked whether he is a tenant of the premises, and what is his rent, at least before it appears that a written agreement as to the holding was entered into (*a*)]. Secondly, when the fiat issued,

(*a*) See *Rex* v. *Holy Trinity, Kingston-upon-Hull*, 7 B. & Cr. 611, as remarked on by *Bayley*, J., in *Rex* v. *Merthyr Tidvill*, 1 B. & Adol. 31; *Trenn* d. *Thomas* v. *Griffith*, 6 Bing. 534. The cases are considered in Tyrwhitt's Edition (6th), of Dickenson's Quarter Sessions, 816. Also *Keys* v. *Harwood*, 2 C. B. 905.

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the bankrupt had the books in his possession by the plaintiff's consent, and therefore at that time was either the reputed owner of them, or had taken upon him the sale, alteration, or disposition of them as owner, within 6 Geo. 4, c. 16, s. 72, so as to entitle his assignee to sell under the fiat. In *Horn* v. *Baker* (*a*), Lord *Ellenborough* said, "The true object of the statute 21 Jac. 1, c. 19, ss. 10, 11 (*b*), was to make the reputed ownership of goods and chattels in the possession of bankrupts at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods." [*Parke*, B.—That case was one respecting trade fixtures of bankrupt distillers, and is different from the present. At the time of Cunningham's bankruptcy, these books were in his possession as a factor for sale. Did the bankrupt, having a bare authority to sell, take the ownership of the goods with consent of the actual proprietor?] Except in the particular trades of warehousemen and factors, who are known to sell goods which are not their own, no person is to suppose that a trader is not the owner of all the goods on his premises. These books were in possession of the bankrupt at the time of his bankruptcy, at all events on sale or return. [*Parke*, B.—He had them not as owner, or on sale and return, but as factor. No false colours are held out, or false credit obtained, by a trader's possession of goods as factor, any more than by his holding goods as trustee, which goods so held would not pass to his assignees (*c*)]. *Lawrence*, J., says, in *Horn* v. *Baker*, "The question in these cases (as was observed by Mr. Justice *Buller*, in *Walker* v. *Burnell* (*d*)), is rather a question of fact

(*a*) 9 East, 215.

(*b*) The prototype of sect. 72 of the 6 Geo. 4, c. 16.

(*c*) See *Shaftesbury* (*Earl*) v. *Russell*, 1 B. & Cr. 666.

(*d*) Doug. 317. This dictum of *Buller*, J., was also relied on by the Court of C. P., in 1 Bos. & P. 89.

than of law; and therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time, for if the true owner suffers a trader to have the reputed ownership of goods left in his possession, and he become bankrupt, the statute says that the property shall go to his assignees." [*Parke*, B.—Credit is rarely now given to a man on the faith of his possession of goods in his house (*a*), but on his character for solvency. *Platt*, B.—Here the bankrupt was a mere agent for sale. Would all the goods sent to an auctioneer's rooms for sale pass to his assignees?]

PARKE, B.—No rule can be granted in this case. By sect. 11 of 21 Jac. 1, c. 19, a reputed ownership was constituted by the bankrupt's having, by consent of the true owner, the goods in his possession, order, *and* disposition. This enactment is incorporated in stat. 6 Geo. 4, c. 16, s. 72, which agrees with it in other particulars, except that, by the substituting *or* for *and*, the present enactment stands "possession, order, *or* disposition." The first question, whether the oral evidence was properly received, though the terms of agreement between the plaintiff and defendant had been reduced into writing, depends on the time when the objection to its admissibility was taken. On that subject, it is sufficient to say that the Lord Chief Baron's note shews that it was not taken till after the witness had given the answers admitting that he had books for sale as agent to the plaintiff. That was too late. As to the other point, it is notoriously the practice of booksellers to sell books received by them to be sold by them on commission. That would rebut the inference that the defendant held these particular goods as owner. But had there been no such evidence, I should not think that these books

(*a*) See *Lingham* v. *Biggs*, 1 Bos. & P. 82, 88.

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passed to the assignee, as it is well known that booksell act also in the capacity of factors. It appears to me tl in this case, the bankrupt received the deposit of the bo in question, not as owner, but as factor, and as such had possession, but with authority to sell; and that enough to take it out of the statute. It was said, that a was not shewn by the plaintiff to have been known to world to be such factor, the books would pass to his as nees in respect of his reputed ownership; but that is so; for, if booksellers sometimes act as factors, and it part of their business to sell books of which they are the owners, no one had a right to presume these book be his own, without inquiring how the case really sto Besides, as to the necessity of notoriety, there was enou evidence here to shew that all persons interested were upon inquiring whether the defendant held the books as f tor or owner. The question of reputed ownership does arise on these facts. In a very early case on the bankr laws, *Mace* v. *Cadell* (*a*), it was held that the stat. 21 Ja c. 19, s. 11, did not extend to the case of factors, who h the possession of other men's goods merely as trustee under a bare authority to sell for the use of their prin "The goods must be such as the party suffers the trad sell as his own." A luminous exposition, by Lord *I dale*, of the corresponding Irish Act, 11 & 12 Geo. 3 s. 9, will be found in *Joy* v. *Campbell* (*b*). Lord *Re* there says: "That clause refers to chattels in the sion of the bankrupt, 'in his order and dispositio consent of the true owner.' That means where 'the sion, order, and disposition' is in a person who is owner, to whom they do not properly belong, and wh not to have them, but whom the owner permits unc tiously, as the act supposes, to have such order and tion. The object was to prevent deceit by a tra

(*a*) Cowp. 232. (*b*) 1 Scho. & Lef

his visible possession of property to which he was not entitled; but, in the construction of the act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another, with the consent of the true owner. Now, who was the true owner of the property after the death of Williams? The true owner was Thomas, subject to the payment of the debts and legacies of Williams. Thomas was the acting executor and residuary legatee, and the possession was, therefore, according to his right, but was, as against him, chargeable in favour of creditors and legatees, the creditors having a right to charge at law or in equity, the legatees in equity only. In all those cases in which that clause in the act has been permitted to have the effect of divesting the right in the person who had a right to the property, the nature of the possession has always been considered, and whether it was according to right." Here the plaintiff was the owner of the books, which, before the bankruptcy, he put into the hands of the bankrupt for sale. The defendant having sold them, it was for him to divest that ownership of the plaintiff, by shewing it to have passed to himself as assignee, under sect. 72 of 6 Geo. 4, c. 16. The plaintiff having begun by proving his prior title, the onus was on the defendant to cut it down, by proving the bankrupt to have been reputed owner within the statute. But, as the books were put into the bankrupt's hands for sale, the case was one of principal and factor. Besides, it was well known in the particular trade, that goods are held on commission for sale on account of their owners.

PLATT, B.—I am of the same opinion. It is notorious that booksellers carry on business as factors, which excludes all presumption that the books held by the bankrupt were held by him as their owner. I also think that the fact of sale by commission may be proved by parol, though the

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terms of it were also stated in writing. It is like giving oral proof of the fact of payment of money quâ rent, though the tenancy was created by lease or agreement in writing.

POLLOCK, C. B.—I am of the same opinion. The evidence left no doubt that publishers were in the habit of selling on commission, which brought the case within that class of decisions (of which *Mace* v. *Cadell* is one) which settled that bankers, factors, brokers, and others similarly situated, are not within that part of the statutes of bankruptcy which relates to reputed ownership. That case has in all times been upheld. As soon as it appears to be a branch of a party's business to sell the goods of others on commission, that establishes him to be a factor. As to the question of evidence, I think that the fact of the relation existing between the bankrupt and the plaintiff might be proved without producing the letter, though, had it been necessary to prove the terms of that relation, they could only have been proved by the letter. But here no objection was made till the terms of the deposit were inquired into; for it had been already proved that they were in the hands of the bankrupt for sale on commission. I do not think, however, that production of the letter was the only mode of proving the relation of the parties to be principal and factor. I think a witness might have been allowed to prove the fact, that he held the goods as factor, though, if it had been necessary to inquire as to the terms of that holding, and they were in writing, it could only be proved by producing the document itself. Again, where goods are pawned, the pawnbroker may prove that fact, without producing the duplicate shewing the money which was advanced.

Rule refused.

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Jan. 23.

Trespass for breaking and entering the plaintiff's close, and damaging the fences, &c. Plea of justification under a right of way. New assignment, that the action was brought for a trespass on a certain other portion of the said close, setting out that portion by abuttals. Plea to the new assignment, that before the said time when &c., and whilst the defendant so had the right to the said way in the first plea mentioned, the plaintiff obstructed the way in the first plea mentioned, by digging a trench across the same, and because the defendant could not remove the obstruction, he did, for the purpose of avoiding the same, and using the way, depart out of the same,

TRESPASS for breaking and entering the plaintiff's close, in the parish of Brinkworth, called Lewis's Ground, breaking the fences and hedges, pulling up plaintiff's poles, and throwing rubbish into the ditch, and thereby choking it up. Pleas:—1st, that the defendant was seised in his demesne as of fee of a certain close, called Lower Westfield, in the parish of Brinkworth, and justifying under a right of way by prescription, on foot, and with horses, carts, and carriages, therefrom, to and over a close called Fry's Leaze, and from thence unto, into, through, over and along the said close in which &c., and thence unto and into a certain common and public highway, leading, &c., and from thence back again unto, into, over and along the said close in which &c., unto, into, &c. the said close called Fry's Leaze, and from thence unto and into the said close called Lower Westfield; wherefore the defendant, having occasion to use the said way, &c., did pass and repass from and out of the said close called Lower Westfield, &c., and because the said fences, hedges, poles and ditch, before the said time when &c., had been respectively wrongfully erected, placed, made and cut, and were respectively then standing and being in and across the said way, and obstructing the same, so that without forcing, breaking, damaging and spoiling the said fences and hedges, and breaking down, damaging, pulling up and spoiling the said poles, and casting and throwing large quantities of earth, stones and rubbish into the said ditch, and choking

along the said other portion of the close in the new assignment mentioned, and because the said fences in the new assignment mentioned were standing on a portion of the close in the new assignment mentioned, and that without breaking and damaging the same he could not go over the residue of the said close in which &c., he did necessarily a little break and damage the said fences, &c. Replication, de injuriâ:—*Held*, (*Platt*, B. dissentiente) 1st, That the right of way stated in the plea to the declaration was not admitted by the plaintiff in his new assignment; and, 2dly, that the right being re-asserted, though informally, in the plea to the new assignment, it was put in issue by the replication, so as to throw the onus of proving it on the defendant.

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and filling up the same, the defendant could not pass or repass out of the said close called Lower Westfield, &c., unto, into, through, over and along the said close in which &c., and from thence unto and into the said highway, and so from thence back again, &c., the defendant did unavoidably, and to a little and necessary degree, force and break to pieces, &c. the said fences, &c. &c., which are the several trespasses, &c. Verification.—Second plea, justifying the trespasses under 2 & 3 Will. 4, c. 71, s. 2, in right of user of a like way for the full period of twenty years next before the commencement of the suit (*a*). Verification.

New assignment to both pleas:—That the plaintiff issued out his writ in this cause, and brought his said suit thereupon against the defendant, not for the said trespasses in the said first and last pleas of the defendant mentioned, on the part of the said close over which the defendant has in these pleas asserted and claimed a right of way, but also for that the defendant, on the said 11th of December, 1845, out of the said pretended ways in those pleas mentioned, or either of them, to wit, on a certain other portion of the said close, that is to say, a certain portion of the said close distant two yards and six inches from the north-west corner thereof, in length seven feet, and in breadth ten feet, and bounded on the north and west by a certain close called Fry's Leaze, committed the said trespasses in the said declaration mentioned, in manner and form as the plaintiff had above thereof complained against him; which said trespasses above newly assigned are other and different trespasses from the said trespasses in the said first and last pleas mentioned, and therein attempted to be justified. Verification, and prayer of judgment.

Pleas to the new assignment:—1st, Not guilty, and issue thereon; 2nd, That before the said time when &c. in the

(*a*) See *Parker* v. *Mitchell*, 11 Ad. & E. 788.

said new assignment mentioned, and whilst the defendant so had the said right to the said way in the said first plea mentioned, to wit, on the 1st of December, 1845, the plaintiff wrongfully and unlawfully stopped up and obstructed the said way in the said first plea mentioned, by then digging, excavating, and making a deep and wide pit, trench, and excavation, in and across the same, in the said close of the plaintiff, and putting and placing in and across the same in the said close in which &c., and over the said pit, trench, and excavation, divers and very many trunks of trees and pieces of great weight, and fixing and fastening the same together with iron, and the plaintiff from thence &c. wrongfully and unlawfully kept and continued the said way so stopped up and obstructed, so that the defendant could not at any time during the time aforesaid pass or re-pass in or along, or use the same; and the defendant, during all the time aforesaid, had no way from or to the said close of defendant, called Lower Westfield, other than the said way in the said first plea mentioned; and that at the said time when &c., in the said new assignment mentioned, the defendant had occasion to use and it was necessary for him to use the said way, and because the same was so stopped up and obstructed as aforesaid, so that the defendant could not then pass or re-pass in or along or use the same without removing the said stoppage and obstruction, and because the defendant could not remove the said stoppage and obstruction without undergoing and performing great and inconvenient labour and trouble, and expending divers of his moneys, the defendant, in order to use and for the purpose of using the said way, did, at the same time when &c., to avoid and escape the said stoppage and obstruction, and to a little and necessary degree, and to a small and convenient distance, and no more or further than was necessary for the purpose of avoiding and escaping the said stoppage and obstruction, and getting into and using the said way, *go and depart* from and out

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of the same, in, on, and along the said other portion of the said close in the said new assignment mentioned, and from thence, as soon and quickly as he could, and by the shortest, nearest, and most convenient way that he could, unto, into, through, over and along the residue of the said way that was not stopped up and obstructed as aforesaid; and because the said fences, hedges, poles and ditch, in the declaration mentioned, before and at the said time when &c., in the said new assignment mentioned, had been respectively erected, placed, made and cut, and were respectively then standing and being in and across the said portion of the said close in the said new assignment mentioned, so that without forcing, breaking to pieces, damaging and spoiling the said fences and hedges, and breaking down, damaging and pulling up and spoiling the said poles, and casting and throwing large quantities of earth, stones and rubbish into the said ditch, and choking and filling up the same, the defendant could not then go in, on and along the said other portion of the said close, in which he so went as aforesaid, for the purpose aforesaid, and from thence by the shortest and nearest way that he could unto, into, through, over and along the said residue of the said way, through, over and along the said close in which &c., and from thence unto and into the said highways, and so from thence back again unto, into, through, over and along the said close in which &c., in the said way there as he ought to have done, the defendant, at the time when &c., in order to remove the said obstructions, and for the purpose of removing the same, did necessarily and unavoidably, and to a little and necessary degree, force and break to pieces, damage and spoil the said fences and hedges, and did also then break down, damage, pull up and spoil the said poles, and did also then cast and throw the said quantities of earth, stones and rubbish into the said ditch, and thereby then choke and fill up the same, as he lawfully might for

the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasions aforesaid, which are the several trespasses above newly assigned. Verification.

Replication:—Issue joined on first plea to new assignment. De injuriâ to second plea, and issue joined.

At the trial, at the last summer assizes for Wiltshire, before *Platt*, B., it was contended that everything which was alleged in the plea was put in issue, viz. that the defendant went *only* to a small and convenient distance from the way, and not further or otherwise; which incidentally put in issue the right of way in the particular spot ascertained by the pleadings. The learned Judge intimated that the right of way laid in the plea, as also the defendant's not going to a greater than a convenient distance from it, were admitted on the new assignment, so that the obstruction only was in issue. The plaintiff's counsel then admitted a trampling of the spot where the trespass was committed, which the plaintiff afterwards made good. On this the learned Baron held, that the obstruction being in truth admitted, nothing was left for the jury to try. He directed a verdict for the plaintiff on the first issue, and for the defendant on the second.

A rule for a new trial having been obtained, on the ground of misdirection,

Butt and *Slade* shewed cause.—The learned Baron's view of the pleadings was correct. The question was, whether the replication de injuriâ, to the plea to the new assignment of extra viam, put in issue the existence of the right of way stated in the original plea? Now as the new assignment does not traverse that way, it must be taken to be admitted, and the replication de injuriâ raises the question whether any cause existed for going out of it. [*Parke*, B.—The defendant had no right to remove the obstructing matters, unless he had a right of way over the close mentioned in

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the declaration, and was compelled, in the exercise of it, to go out of that close over the small bit of land set out by abuttals. It is only the obstruction of such a right of way that would give the defendant a right to go out of it over that small bit. It was for him to make out that case. The new assignment admits nothing, but is a new declaration, complaining that the defendant trespassed on the bit of land set out by abuttals. The plea to the new assignment states matter about that bit of land, all which the plaintiff in his replication de injuriâ alleges to be untrue.] It is submitted that the new assignment admitted the right of way pleaded in justification. [*Parke*, B.—Suppose another action to be brought by the plaintiff against the defendant for again going over the locus in quo, could the present new assignment be pleaded by way of estoppel? (*a*)] No. [*Parke*, B.—But if you are right in your argument, it could. *Alderson*, B.—You say the plaintiff has admitted the defendant's right of way over the close, because the plaintiff has said in his new assignment that he was not going for the exercise of that pretended right of way claimed by the defendant, but for a trespass to another part of the plaintiff's close, where the defendant had no right to go.] The new assignment means, I do not go for damages for the trespass in the declaration. The plea to it does not re-assert any right of way, which distinguishes this case from *Norman* v. *Wescombe* (*b*), where an affirmative fact of tenancy was set up in the plea to the new assignment, and was denied by the replication de injuriâ. The right of way set up in the original plea is not put in issue by the plaintiff. [*Alderson*, B.—That might be true, if the plea to the new assignment were pleaded to the same part of the close as the original plea was, but here it is pleaded as to a different part of that close.] The plea to the new assignment does not set up any right of way. [*Parke*, B.—It is mere accident that the trespass on the spot newly assigned is con-

(*a*) See 2 M. & W. 358.
(*b*) 2 M. & W. 349. See *Greene* v. *Jones*, 1 Saund. 300, and 299 a, note (*f*).

nected with the right of way pleaded. It might have been an entirely different spot. A new assignment assumes the defendant to be under a mistake. The plaintiff does not complain of an injury done by the way on this occasion, but of injury done to a bit set out by abuttals. That is like setting out abuttals in a declaration. It so happens that the defendant brings it into the case by the necessity he was under of pleading the way, but he might have had many other grounds of justification. Here it so happens, that his justification in right of a way over the bit of land set out by abuttals is connected with the right of way he at first pleaded. *Alderson*, B.—The new assignment is, that the plaintiff brought his suit, not for the said trespass in the original pleas; not that it was brought not *only* for those trespasses. "Also" is surplusage. The effect of this new assignment is simply to alter the declaration, by saying "I mean to go for a trespass to the bit of close A. which I set out by abuttals. I call on you to answer for trespassing over the bit which I have set out." Surely the defendant was bound to justify, by setting up a new right of way in his plea to the new assignment.] A new assignment extra viam was always treated as admission of the right of way in the plea, for the plaintiff might have traversed that right of way and new assigned also. [*Parke*, B.—The new assignment is extra the pretended, not the admitted, way. The plaintiff says by it, "I do not assert whether you have that right of way from A. to B.; I go for a trespass in a different bit of the same close, viz. at C.;" you must give a perfect answer to that. The defendant seeks to make the new assignment equivalent to an admission of that right of way, because the plaintiff does not go for a trespass over that part where the pretended right of way is set up.] If the plaintiff does not deny the way pleaded, but new assigns, he admits that way. [*Parke*, B.—No, he declares anew. The plea to the new assignment might have been bad on special demurrer, for setting up a right of way not expressly,

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as ought to have been done, but by inference only. But as the plaintiff has not demurred, the only question is, whether the right of way originally pleaded was put in issue by the replication to the plea to the new assignment, or did the new assignment admit the original plea.] The plaintiff has altogether passed by the right of way originally relied on. [*Alderson*, B.—You have neither admitted nor denied a right of way, except by inference; that would have been bad on special demurrer.] Surely the going for a trespass in another place admits the right of way first pleaded.

Crowder and *Crompton*, contrà, in support of the rule, were stopped by the Court (*a*).

POLLOCK, C. B.—The rule in this case must be made absolute. The defendant pleads to an action of trespass, that he has a right of way over the close in question; to this the plaintiff newly assigns, stating in substance that he complains not of the defendant going over the close over which his plea alleges that he has a right of way, and says nothing as to any right to do so, but that he is bringing his action for a different trespass by the defendant, viz. in going over another part of the close, as to which he has pleaded nothing. The question now is, whether such a new assignment is for any purpose an admission of the defendant's right of way over the close, in respect of which he has justified. Were it necessary to refer to the authorities, the case of *Norman* v. *Wescombe* is directly in point for the

(*a*) As to right to go out of a public way because out of repair, see *Taylor* v. *Whitehead*, Doug. 745, 748; *Ballard* v. *Harrison*, 4 M. & S. 387; 1 Wms. Saund. 322 c, n. (3); *Reynolds* v. *Edwards*, Willes, 232; *Dand* v. *Kingscote*, 6 M. & W. 174; *Aldred* v. *Constable*, 6 Q. B. 376. In the principal case, the replication appears to have been drawn so as not to admit the way set up in the plea to the new assignment.

negative. There the defendant pleaded to the new assignment matter similar to that he had before pleaded to the original declaration, and the Court held, that the plaintiff, by pretermitting in the new assignment the matters stated in the plea, and substituting a new for the old declaration, had not admitted those matters, so that the defendant was bound to prove them. If, therefore, in this case the new assignment has pretermitted matters stated in the plea to the declaration, and they are stated again in the plea to the new assignment, they must be proved by the defendant. The plaintiff in his new assignment says, "You the defendant have mistaken my cause of complaint, and I say nothing as to the right of way claimed by you in your plea." The defendant then brings forward his right of way again, in an inartificial manner, in his plea to the new assignment. Whether the matter asserted in the old plea forms part of the matter denied by the plea to the new assignment or not, I am clear on the whole that the right of way, as originally pleaded, is not admitted by the new assignment.

PARKE, B.—I entirely concur. I think that the right of way originally pleaded is put in issue by the replication de injuriâ. The defendant, however, contends that that right of way, as so originally stated, viz. in the plea to the declaration, is admitted by the new assignment. The effect of the new assignment, however, is not to admit the previous pleading to be true. The plaintiff by his new assignment merely says, that the defendant has made a mistake, and that he, the plaintiff, is going for a trespass which has not been justified. The new assignment is in the nature of a fresh declaration, excluding all cause of damage arising from the defendant's going over the close in question in exercise of his right of way. The plaintiff says, "I declare for a fresh trespass in respect of the defendant's having gone over a piece of land, which is set out by abuttals in my new assignment,

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and the defendant must answer that afresh." To this fresh trespass the defendant was bound to make a good answer. He says that he committed the trespass, because he had a right of way, which the plaintiff has passed over in his new assignment. That allegation he is bound to prove. If he had pleaded leave and licence, he must have proved it. So here, if the right of way set up is connected with that originally pleaded by the defendant, he must prove that right of way. In his plea to the new assignment he does not say what right of way he has, but states it by inference. That would perhaps have been bad on demurrer. He says he had a right of way, and in exercise of that right went out of the way, and committed the trespasses in question in the place which forms the subject of the new assignment. There being no demurrer, the whole material part of the plea, viz. the right the defendant had, is put in issue by the replication, and the defendant is accordingly bound to prove it. The substratum of the defence is in issue, and the fallacy of the argument consists in treating the new assignment as admitting the matters stated in the plea. *Norman* v. *Wescombe* and the later case of *Brancker* v. *Molyneux* (*a*), are in point. The defendant had no right to go on the bit of land set out by abuttals, in respect of any right of way he might have over another part of the close.

ALDERSON, B.—I am entirely of the same opinion. The plaintiff declares in respect of a trespass committed upon close A. The defendant pleads, as to that trespass, that he had a right of way over part of the close. The plaintiff in his new assignment says, that he neither admits nor disputes the right of way set up by the defendant, but that he is bringing his action for a trespass committed in another part of the close in question, which part he sets out by metes and bounds. Thus the right of way, claimed by the defendant in his

(*a*) 1 Man. & Gr. 710.

plea to the declaration, is neither admitted nor denied by the new assignment. The plaintiff does not go for both trespasses, but only for one, by his new declaration or assignment. The defendant in his plea to that new assignment states, that he has the same right of way as he alleged in his plea to the declaration, and that that right has been obstructed, wherefore he went out of the way on the other part of the close. The plaintiff in his replication to that plea says, that the defendant had no such cause of obstruction as he alleges, for trespassing upon the other part of the close. The defendant went over the close in question, because he claimed a right of way there, which was obstructed. That right of way was put in issue by the replication de injuriâ, and was to be proved by the defendant. *Norman* v. *Wescombe*, and other cases, are applicable on principle.

PLATT, B.—I retain the opinion I formed at Nisi Prius, and am compelled to differ from the rest of the Court. The case of *Norman* v. *Wescombe* does not in my opinion apply. There the plea to the new assignment re-stated the facts alleged in the plea to the declaration. That is not the case here. The declaration complains of a trespass, which the defendant justifies on the ground that he has a right of way. The plaintiff new assigns, stating that he is not bringing his action for that trespass so sought to be justified by the defendant, but for another and different one. He does not deny the defendant's alleged right of way, but says that the trespass for which he brings his action is in respect of another part of the close. The defendant in his plea to the new assignment does not re-assert the right stated in his plea to the declaration; he merely states that his right of way continues, and that the plaintiff placed obstructions on the way, in the removal of which the trespasses were committed. The question as to the obstruction or non-obstruction of the way originally pleaded was, as it appears to me, all that was put in issue by the replica-

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tion de injuriâ. The rest of the plea to the new assignment contains merely a statement of the time, and not a re-assertion of the right of way. The plea alludes to the right of way only for the purpose of designating the trespass. The act of obstruction is the only matter put in issue by de injuriâ. However, the rule must be made absolute for a new trial.

Rule absolute.

LAWS and BELCHER, Assignees of BOTT, a Bankrupt, v. BOTT (a).

The official assignee of a bankrupt or insolvent is entitled to be indemnified against the costs of an action brought in his name without his authority.

THIS was a rule obtained on behalf of the plaintiff Belcher, the official assignee of an insolvent, under 7 & 8 Vict. c. 96, calling on the plaintiff Laws and his attorney to shew cause why all proceedings should not be stayed until the plaintiff Belcher was indemnified against costs, such costs to be paid by the plaintiff Laws or the plaintiff's attorney. The affidavits stated, that the action was commenced and prosecuted without the authority of Belcher, and that, application having been made for security to the attorney for the plaintiffs, he had offered an informal undertaking of several creditors of the estate to contribute in proportion to their respective debts, but declined to give any other indemnity. It appeared that the action was authorised by the plaintiff Laws, and other creditors of the estate.

Cleasby shewed cause. The official assignee holds a public office of trust, one of the duties of which is to join as plaintiff in all actions and suits for the benefit of the estate.

(a) This case was decided by *Rolfe*, B., sitting alone, on the last day of Michaelmas Term, (Nov. 25th, 1846). It was accidentally omitted in its proper place.

He has voluntarily taken that duty upon him, and cannot now refuse to perform it or claim indemnity against the consequences: *Emery* v. *Mucklow* (*a*). *Ex parte Turquand* (*b*) shews that an official assignee is bound to allow his name to be used, and the dicta of the Chief Judge are opposed to the general right to indemnity now claimed.

Willes, in support of the rule. It is a general rule, that where one of several having a joint right of action is made co-plaintiff without his authority, he is entitled to an indemnity against costs: *Whitehead* v. *Hughes* (*c*). That rule is applicable, à fortiori, to a case like the present, where the applicant has no personal interest in the matter of the action. In *Emery* v. *Mucklow* it does not appear that the action was *commenced* without an authority of the co-trustee. The judgment in *Ex parte Turquand*, and the dicta referred to in argument in that case, assume that a court of law would enforce an indemnity in cases of this description.

ROLFE, B.—The rule must be absolute, on the general principle stated by *Bayley*, B., in *Whitehead* v. *Hughes*. Indeed, it does not require authority to establish a principle so manifestly just, as that a person whose name is allowed to be used without his authority, by compulsion as it were, is entitled to an indemnity. I rather collect from the judgment in *Ex parte Turquand*, that an official assignee is considered peculiarly entitled to an indemnity; but I decide this case on the general principle stated in *Whitehead* v. *Hughes*. As it appears that the action was authorised by the plaintiff Laws, he must pay the costs.

Rule absolute, with costs.

(*a*) 2 Dowl. P. C. 735. (*b*) 1 Mont. D. & D. 475.
(*c*) 2 Dowl. P. C. 258.

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Jan. 18.

WALKER *v.* NUSSEY.

Debt for goods sold and delivered. Pleas. never indebted and set-off. Plaintiff owed defendant a debt, and while it remained due sold him goods by sample to a larger amount, and exceeding £10, without note or memorandum in writing of the bargain for sale. Part of that bargain was, that the debt due from plaintiff was to go in part payment by defendant to him, but no actual payment of money was made by either, nor was any receipt given by defendant for plaintiff's debt to him. The goods were supplied to defendant, who returned them as inferior to sample, and the jury found that he had never accepted them. Verdict for defendant:— *Held*, on motion for a new trial, that nothing had been given in earnest to bind the bargain, or in part of payment, within 29 Car. 2, c. 3, s. 17, so as to make the contract binding on the buyer.

DEBT for goods sold and delivered, and on an account stated. Pleas,—1st, never indebted; 2nd, a set-off for goods sold and delivered, and on an account stated. Issues thereon. At the trial, before the undersheriff of Yorkshire, it appeared that, the defendant having sold goods to the plaintiff to the amount of 4*l.* 14*s.* 11*d.*, the defendant, on a subsequent occasion, bought of him a lot of leather, of two sorts, by sample. It was then verbally agreed between them, that the 4*l.* 14*s.* 11*d.* due to the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant, with this invoice:—

"Halifax, Oct. 14th, 1846.

"Mr. William Nussey, bought of Thomas Walker.

	£	s.	d.
Dressed hide bellies, 287 at 9*d.* .	10	15	3
Insole, 376 at 6½	10	3	8
	20	18	11
By your account against me . . .	4	14	11"

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the 4*l.* 14*s.* 11*d.* The plaintiff refused to receive the goods, and brought this action, stating, in his particulars of demand, that the action was brought to recover the sum of 16*l.* 4*s.*, as the "balance of the following account," (setting out the above invoice).

The undersheriff ruled, that there was nothing to shew that the 4*l.* 14*s.* 11*d.* had been given by the defendant in earnest, or part of payment, under 29 Car. 2, c. 3, s. 17, and left nothing to the jury, except on the point of acceptance

of the goods by the defendant, directing them to find for him if they thought he returned the goods in a reasonable time, without taking to them (*a*). The jury found a verdict for the defendant on both issues.

Addison now moved for a new trial, on the ground of misdirection. By 29 Car. 2, c. 3, s. 17, "no contract for the sale of any goods, wares, and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." This transaction amounted to an agreement that, on the defendant's purchasing the leather, the 4*l.* 14*s.* 11*d.* before then due to him from the plaintiff, was to be a part of the purchase-money accruing due to him. That agreement enured, therefore, to take this case out of the statute, as part payment within sect. 17. [*Parke*, B.—When was the plaintiff's debt to the defendant satisfied, so as to be the subject of a plea of payment, had the defendant sued him? The leather was to be delivered by the plaintiff and taken by the defendant in satisfaction of the 4*l.* 14*s.* 11*d.* due from the plaintiff to the defendant, and the rest of it was to be paid for by the defendant. Was not the contract prospective, and the plaintiff's debt to the defendant only eventually extinguished, in case of the defendant's acceptance of the leather subsequently sent to him by the plaintiff?] The under-sheriff merely left the question of acceptance to the jury. But in *Hart* v. *Nash* (*b*), where the holder

(*a*) See *Lillywhite* v. *Devereux*, 15 Mee. & W. 285; *Street* v. *Blay*, 2 B. & Ad. 463; *Edan* v. *Dudfield*, 1 Q. B. 302.

(*b*) 2 C., M. & R. 337; 5 Tyr. 955, acted on in *Hooper* v. *Stephens*, 4 Ad. & E. 71.

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of a bill agreed with the party liable to pay it, that, till he could pay it, he should supply the holder with hats, and that they should be "paid on account;" the Court held that the delivery and receipt of the hats under that agreement was "part payment" within the Statute of Limitations, 9 Geo. 4, c. 14. [*Alderson*, B.—There the supply of hats by the defendant, in part payment, was subsequent to the agreement, which is very different. The words of section 17 are not, "except the buyer shall have accepted," but "except the buyer shall accept," part of the goods so sold, and actually receive the same,—that is, at the time of the bargain made.] It was not necessary that the money should have been paid by the plaintiff, in order to be repaid by the defendant in part payment for his purchase; for, from the moment of the agreement, the defendant's goods became part payment of those agreed to be delivered to him by the plaintiff, and the defendant had no longer any cause of action against the plaintiff. [*Platt*, B.—You rely on part of the contract itself as being part performance of it.]

POLLOCK, C. B.—I think no rule ought to be granted. The plaintiff sues for goods sold and delivered by him, to the defendant, above £10 in value, and it was admitted that the defendant had previously sold him goods for 4*s.* 14*s.* 11*d.* On the new dealing between them the agreement was, that that sum should be taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the amount of the goods bought from him. This contract was verbal; .but it is argued that the 4*l.* 14*s.* 11*d.* was a part payment by the defendant, so as to take the case out of the Statute of Frauds. But I think it was not. Here there was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by

the plaintiff (*a*). Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods pro tanto instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute.

PARKE, B.—I am of the same opinion, and think the ruling at the trial was right. The facts seem to be these. The plaintiff owed the defendant a sum of 4*l.* 14*s.* 11*d.* The parties then verbally agreed that the plaintiff should sell to the defendant goods above £10 in value, according to a given sample, the plaintiff's debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely. If Mr. *Addison* could have shewn the contract to have been, that the parties were to be put in the same situation at that time, as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant, and repaid by him to the plaintiff as earnest, the statute might have been satisfied, without any money having passed in fact; but the agreement was in fact, that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not "give something in earnest to bind the bargain, or in part of payment." The "part payment" mentioned in the statute must take place either at or subsequent to the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be

(*a*) See *Blenkinsop* v. *Clayton*, 7 Taunt. 597; 2 Bla. C. 447.

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wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff; either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest, or in part of payment, then or subsequently.

ALDERSON, B.—The 17th section of the Statute of Frauds implies, that to bind a buyer of goods of £10 value, without writing, he must have done two things; first, made a contract, and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to actual part payment. In this case, the part payment, or whatever else the bargain may amount to, is part of that bargain itself, and cannot be wrested into proof of an actual payment, without repealing the statute, and suffering a verbal contract for the sale of goods of £10 value to have effect, without the safeguards provided by law against fraud in such cases.

PLATT, B.—In this case, as no note in writing was signed by the parties, it is clear, from section 17, that something was to be done by way of ratifying the bargain, in addition to it, and at the time of its being made. If, on making the bargain, the defendant resigned the debt previously due to him from the plaintiff, or discharged the plaintiff's liability to that amount, that would not be giving earnest at the time of the bargain made, or in part of payment of the whole sum then due from the defendant. As to any discharge of the plaintiff from liability to the defendant at the time of making the second bargain between them, no receipt for the

iff's debt was given by the defendant, or any other done by him, so that everything rested in mere verbal ct, and nothing in the evidence makes it binding on fendant.

Rule refused (*a*).

(*a*) See *Johnson* v. *Dodgson*, 2 M. & W. 653.

BURTON *v.* REEVELL and Another.

Jan. 21.

PASS for breaking and entering certain rooms of ntiff, in and parcel of a dwelling-house, and seizing ing therein divers goods and chattels of the plaintiff. ot guilty, by statute. At the trial, at the Middlesex after last term, before *Pollock*, C. B., the defence ed on a distress by the defendant, as landlord, for a rent of the rooms occupied by the plaintiff. The s alleged to be a rack-rent. For the plaintiff it was d, that the distress was premature, the rent being monthly; and the following document was ten- a evidence to prove that fact:—"Memorandum of nt made this 3rd day of July, 1845, between Mar- Marshall of the one part, and William Burton, of treet, Bond-street, of the other part. Margaret Mar- rees to let, and William Burton agrees to take, the arlour, and front kitchen, of house No. 6, Avery- m the 7th day of this month, being Monday next, nonthly rent of 36*s.* to be paid every four weeks,

By 7 & 8 Vict. c. 76, s. 4, (in force from and after the 31st of December, 1844, and repealed by 8 & 9 Vict. c. 106, from the 1st of October, 1845), it was enacted, that no lease in writing of any freehold, copyhold, or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease. By a document, dated the 3rd of July, 1845, and purporting to be a memoran-

eement (made while that section was in force), M. agreed to let and B. to take certain house from the 7th day of that month, for the monthly rent of 36*s.*, to be paid every :—*Held*, that it was only an agreement to execute a lease, and was well admitted in such agreement, without a stamp, being of no certain value above 1*l.* 16*s.* whether, since the repeal of 7 & 8 Vict. c. 76, s. 4, by 8 & 9 Vict. c. 106, such a um would require a stamp of 1*l.* 15*s.* as a lease under 55 Geo. 3, c. 184, sched. part 1,

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the first month's rent due on the 6th of Augu
Marshall's mark, X. Witnessed by Willia
Frederick Beever. 1*s.* paid as a deposit."
ment not being stamped, its admission in ev
sisted on the part of the defendant, on the
by the terms of it premises were demised at t
per month, it was a lease which by 55 Geo. 3
dule, part 1, tit. Lease, required a stamp of 1*l.*
to be read in evidence. The Lord Chief B
the evidence, but gave leave to the defenda
enter a nonsuit. Verdict for the plaintiff.
been obtained according to the leave reserved

C. J. Addison now shewed cause.—The doc
tion was properly admitted in evidence, for it i
or tack of any kind not otherwise charged" i
of 55 Geo. 3, c. 184, part 1, so as to be liable
duty of 1*l.* 15*s.* thereby imposed on such instr
term "lease," as there used, does not includ
fraction of a year, but contemplates a demise
for one or more years. It is connected throug
dule with the words "yearly rent." [*Parke,*
yearly rents amounting to £20, or upwards, a
in the schedule before it mentions leases of any k
wise charged in it, so that your argument w
latter provision without meaning.] To exte
of 1*l.* 15*s.* to such instruments as the presen
tax minor holdings at nearly £100 per ce
leases of larger interests would not be cha
£10 per cent. A term in a statute, particul
kind, is to be understood in the popular sen
on Statutes, 702. Now "lease" in England
in Scotland, usually conveys the idea of a le
more than a year at least. [*Alderson,* B.—A
a year, and so on from half-year to half-ye
lease in popular language, though not grant

rent. The like as to a lease for 364 days, and so on for 364 days. *Parke*, B.—When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears. That is the rule of construction of technical expressions, even when occurring in a will (*a*).]

Secondly, this instrument is not a lease, for it contains no present demise, and was to take effect on a future day: Bacon's Abridgment, tit. Leases, (L). Again, there being no stipulation to let for any fixed term, but a general letting and hiring at a monthly rent, a month's notice to quit would be correct notice, at least in the case of lodgings so let and hired (*b*), and no letting for a year could be implied: *Wilkinson* v. *Hall* (*c*).

Thirdly, this instrument is dated in July 1845. At that time 7 & 8 Vict. c. 76, was in force. That act commenced and took effect from the 31st December, 1844, and continued in force, as to section 4, till the 1st October, 1845, from which day it was repealed (*d*). By section 4 of 7 & 8 Vict. c. 76, it was enacted, "that no lease in writing of any freehold, copyhold, or leasehold land shall be valid as a lease or surrender, unless the same shall be made by deed, but any agreement in writing to let or to surrender any such lands shall be valid and take effect as an agreement to execute a lease or surrender, and the person who shall be in possession of the land, in pursuance of any agreement to let, may, from payment of rent or other circumstances, be construed to be a tenant from year to year (*e*)." It is clear from that enactment, that this instru-

(*a*) See per Lord *Lyndhurst*, C. B., 3 Tyr. 921, 922, in *Doe* d. *Meyrick* v. *Meyrick*; *Russell* v. *Buchanan*, 4 Tyr. 384. Also 6 Maddock (or Madd. & Geldart), 346; and cases collected, 3 Ad. & E. 345; and *Doe* v. *Gallini*, 5 B. & Adol. 621.

(*b*) See cases in Coote's Landlord and Tenant, 354.

(*c*) 4 Scott, 301; 3 Bing. N. C. 508; see *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553.

(*d*) Viz. by 8 & 9 Vict. c. 106.

(*e*) By sect. 13, this act was not to extend to anything exe-

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ment, not being under seal, could not be a lease, con quently could not require a stamp as such. It could o be an agreement to grant a lease: *Mayfield* v. *Robinson* (And, as such agreement, it is exempted from any stan duty; for the value of the subject-matter of the agreem must be taken from the face of the instrument, which d not disclose any yearly rent of £20 (*b*), or even £5 (*Doe* d. *Marlow* v. *Wiggins* (*d*). [*Parke*, B.—This inst ment may have only passed leave to use the rooms, with conferring any interest, or more than an interesse termi The only certain value appearing on the face of it is 36*s*., the rooms need only be held for a month.]

Petersdorff, in support of the rule.—This is a "lease n exceeding the term of three years from the making there whereupon the rent reserved to the landlord during su term shall amount unto two-third parts at least of the f improved value of the thing demised:" so that, by 29 Car. c. 3, s. 2, it need not have been in writing at all. Now t 4th section of 7 & 8 Vict. c. 76, was intended to apply o to such leases or instruments as at the time of its passi were by law required to be in writing. [*Parke*, B.—T is now expressly provided by 8 & 9 Vict. c. 106, s. 3, which only such leases as are required by law to be writing &c. shall be void at law, unless made by deed.] T act of 7 & 8 Vict. c. 76, s. 4, did not provide for the a logous cases of tenancies for less than a year, c. g. fo month or week.

POLLOCK, C. B.—The words of that section are "

cuted or done, or to any estate, right, or interest created before the 1st of January, 1845.

(*a*) 7 Q. B. 486.

(*b*) See 55 Geo. 3, c. 184, schedule, tit. Lease.

(*c*) Id. tit. Agreement, "for gr ing a lease or tack at rack-ren any messuage, land, or tenem under the yearly value of £10

(*d*) 4 Q. B. 367. See *Shepl* v. *Wheble*, 8 C. & P. 534.

lease *in writing* of any freehold, copyhold, or leasehold land." Now "land" by the first section is to include "tenements." If this is an agreement, as it has been shewn to be, no stamp was required. The rule must be discharged.

PARKE, B.—I agree that this rule must be discharged. The effect of sect. 4 of 7 & 8 Vict. c. 76, was, that no lease in writing shall be valid, unless made by deed, and that agreements in writing not under seal, which would previously have been considered as leases, should have the force of agreements to execute leases. But for that enactment, this instrument would have amounted to a lease in writing, and would be properly construed as an agreement equivalent to a demise of the premises. Yet, having been made while that enactment was in force, and not being under seal, it became, by its operation, a mere agreement to execute a lease, and consequently did not require to be stamped as an actual demise.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged (*a*).

(*a*) See now 8 & 9 Vict. c. 106, s. 3.

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DYER *v.* DISNEY (*a*).

The Somerset herald-at-arms is one of the Queen's servants in ordinary with fee, and bound to attend her whenever required, as well as on state ceremonials; and is therefore privileged from arrest.

HOGGINS had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, on the ground of his being privileged from arrest as the Queen's servant in ordinary with fee, by the style of Somerset Herald-at-arms. The affidavits stated, that, in 1813, he was appointed by letters patent under the great seal to that office, with all the rights, privileges, and immunities thereto appurtenant, and that he had ever since fulfilled all the duties of such office, and still remained such herald. As such he was a Queen's servant in ordinary, receiving as such a quarterly salary, with other fees, from the Lord Chamberlain, and a livery or dress of office, which he wore when in personal attendance. He was liable to attend her Majesty at any moment when required, and had personally attended her and the three preceding sovereigns, when his presence as herald was required, viz. at the coronation, opening or prorogation of Parliament, royal marriages or funerals, her Majesty's public attendance at the chapels royal, on all saints' and collar and installation days, &c.; but for some years past had been disabled by illness from such attendances on her Majesty as herald. On her creation of titles he received fees, as one of her household servants. He had been several times discharged at chambers from previous arrest, by *Patteson* and *Bosanquet*, Js., and by *Gurney*, B., on a similar claim of privilege; but *Rolfe*, B., refused to discharge him on the present occasion, and indorsed on the writ of summons, that, if the defendant had the privilege claimed, he must sue out a writ of privilege. His counsel having prepared such a writ, it was tendered at the offices of the Petty-bag, and of the record and writ clerks in Chancery, and at the Crown-office, and at the

(*a*) Decided in Easter Term (May 8).

of signer of the writs in Exchequer, but the officers d to issue it, never having heard of such a writ. The lents of the Petty-bag office were searched, but no rrit was found. The Duke of Norfolk was applied to, l Marshal, for his leave to arrest the defendant; but l that he had no control over or right to interfere with

nwell shewed cause in Hilary Term (Jan. 21).—This ust be discharged, for, on a former occasion, this refused to discharge the defendant, though it then ed that he was Somerset Herald: *Leslie* v. *Dis-*. He was then remitted to his writ of privilege. ıer the defendant went to the right offices or not, ther those to whom he applied properly or impro- refused to issue the writ, makes no difference as to le to relief here; for the ground on which the writ fused to be issued was that no such writ was in ce. That shews that his legal right to enforce his ge was at an end. Besides, he is not a Queen's ser- ı ordinary with fee, for his duty is limited to extra- y occasions of full ceremonial, when the attendance lds is requisite: *Luntley* v. *Battine* (*b*), *Byrn* v. *Dib-*

And if he were such servant in ordinary, he would rileged only while capable of active service, which long ceased to be. An attorney's privilege only in- those actually in practice. This privilege is that of een, or of the Earl Marshal, and neither interferes.

gins, in support of the rule.—The defendant is still een's servant in ordinary, liable to be called on to her at any time. His illness does not deprive him of rilege as such, till shewn to be permanent and incur- *Leslie* v. *Disney* is not in point to estop this applica-

ı C., M., & R., 578; 5 Tyr. 181. (*b*) 2 B. & Ald. 234.
(*c*) 1 C., M., & R., 821; 5 Tyr. 357.

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tion, for the defendant's present affidavits detail his duties more specifically than in that case, and entitle him to his discharge. [*Parke*, B., alluded to *Reynel's case* (*a*). If a writ of privilege can only be obtained for the officers of the Court, we ought to consider whether we should not discharge the defendant; but the rule will be discharged, *if* such a writ will lie.]

Cur. adv. vult.

In Easter Term,

ALDERSON, B., delivered the judgment of the Court.—I regret that questions of this kind, relating to the privileges of her Majesty's servants to be exempted from arrest, should arise in modern times; and I must add, that it would be much better if her Majesty was served by persons who are not in debt. The privilege itself is one that belongs not to the party, but to the Crown, and the question here is, whether the defendant has made out to our satisfaction that he is a servant in ordinary to her Majesty with fee. When this defendant's case was before this Court on a former occasion, my Brother *Parke* and myself being the only Judges present, we doubted whether the defendant was a servant in ordinary with fee, and accordingly discharged the rule, directing the defendant to sue out a writ of privilege, if he thought fit. Since that time the same question has been brought before two other Judges, *Patteson*, J., and *Gurney*, B., on fuller affidavits. They considered him servant in ordinary with fee, and ordered him to be discharged. On a later occasion, *Bosanquet*, J., ordered his discharge, on the ground that he was shewn by the affidavits to be a Queen's servant in ordinary with fee. The present affidavits make out that he is in continuous attendance on her Majesty, as his services may be required at any time, and when his services are required, it would be improper that he should be prevented by arrest from discharging his

(*a*) 5 Rep. 95 a.

duties. It appears that he is bound to attend the Queen on the opening, prorogation, or dissolution of Parliament, and to be present at coronations, royal marriages and funerals, and many other ceremonials, the recurrence of which is at uncertain periods. Under such circumstances, it would be improper in this Court to authorise his arrest, and thereby deprive the Crown of the due and ordinary state which belongs to it. It is said that his duties are not continuous, but that forms no ground for arresting him. A chaplain in ordinary is not required to be always preaching before the Queen, but is liable to perform that duty occasionally; nevertheless, his service is a continuous one, though performed at reasonable intervals. The same rule holds with regard to the candle-snuffer and fire-lighter of the palace. In summer no fires are required, and fewer candles burnt: still the duties are continuous, though subject to be performed at uncertain periods. The like in the cases of pages of the second class, and lords of the bedchamber, whose services are usually performed for only a month at a time: they are functionaries who are liable to be called on to serve her Majesty at any time. In like manner, the Somerset Herald-at-arms must be considered as in the continuous service of the Crown, and it is inconsistent with the powers and prerogatives of her Majesty that she should be inconvenienced by the arrest of her servant. The defendant must therefore be discharged, though there may be a doubt as to the proper course to be pursued with respect to him. *Keble* says, in *Rex* v. *Moulton* (*a*), that the Lord Chamberlain ought to remove persons in debt from the service of the Crown, or compel them to pay their debts:—but with this we have nothing to do.

Rule absolute.

(*a*) 2 Keble, 3.

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HARRISON *v.* WATT and Wife.

Debt for goods sold. Pleas, first, as to all but 15*s.*, parcel of the monies in the declaration mentioned, never indebted: secondly, as to the said sum of 15*s.*, parcel &c., payment into court of 15*s.* Replication, similiter to first plea; as to last plea, that plaintiff accepts the 15*s.* in full satisfaction and discharge of the cause of action in the introductory part of that plea mentioned, with prayer of judgment for his costs sustained in that behalf. At the trial, the jury found that the defendants never had been indebted to the plaintiff in more than the 15*s.*:—*Held*, that the plaintiff was entitled to costs on the replication to the last plea.

AN order had been made by *Rolfe*, B., for reviewing t Master's taxation of the defendants' costs in this cause, a for taxing the plaintiff's costs on the replication, on takin money out of court in satisfaction of the causes of actio in respect of which it had been paid in. The action was i debt, for goods sold and delivered to the female defendan while sole, with the common counts. Damages £10 Pleas, except as to 15*s.*, parcel of the monies in the de claration mentioned, never indebted; second, as to th sum of 15*s.*, payment into court of that sum, with a averment that the defendants were never indebted to th plaintiff to a greater amount. Verification.—Replication similiter to the first plea; to the last plea, that the plaintif accepted and took out of court the 15*s.* in full satisfactio and discharge of the causes of action in the introductor part of the last plea mentioned: therefore, as to such cause of action, the plaintiff is satisfied, and prays judgment fo his costs and charges by him sustained in that behalf. Th cause was tried by writ of trial before the undersheriff o Durham, who returned that, on the issue of never indebted the jury found that the defendant Mary, except as to the sai sum of 15*s.*, was never indebted in manner and form as th plaintiff had alleged in his declaration. Upon taxing th costs, the Master allowed the defendants the whole cos of the cause, including those of the plea of payment int court (*a*), and refused to allow any costs to the plainti under Reg. Gen., Trin., 1 Vict.

S. Temple had obtained a rule, calling on the plaintiff t shew cause why the above order should not be rescinded.

(*a*) See Hullock on Costs, 350, 352; *Stevenson* v. *York*, 4 T. R. 1(*Jeffs* v. *Smith*, 4 Taunt. 186.

Bovill shewed cause.—The defendants, instead of plead- payment into court of 15*s.* to the whole causes of ion, have divided their plea, pleading that payment as to t, and leaving a defence as to the rest. [*Parke*, B.— nd the 15*s.*, the plaintiff says he is satisfied. No diffi- y would have arisen on the old mode of paying money court. The 15*s.* would have been struck out, and the tiff would have gone on for the rest. Here the defen- insulates one part of the declaration from the rest, pays y into court on it, and the plaintiff says he is satis- | The Rule of Trin., 1 Vict., is as follows:—"The tiff, after the delivery of a plea of payment into court, be at liberty to reply to the same by accepting the so paid into court in full satisfaction and discharge of ause of action *in respect of which it has been paid in*, he shall be at liberty, in that case, to tax his costs of and, in case of nonpayment thereof within forty-eight s, to sign judgment for his costs of suit so taxed." *rke*, B.—The plaintiff had a right to tax costs quoad 15*s.*, and end the cause so far. He accepted that sum ull satisfaction of 15*s.*, part of the debt and cause of on on which it was paid in. But the plaintiff could not pt it out, if the plea is thus divided; for if he does, he t accept it on the plea of payment of money into court, enter a nolle prosequi upon the issue on never indebted, so become liable to pay all costs. *Alderson*, B.—Had eplied that he had sustained damages ultra, the defen- t would no doubt have been entitled to costs.] As to quantum of costs, it is not only the costs of the plea and ication to which the plaintiff is entitled, though no spe- portion of the declaration is recovered on, and no addi- al costs incurred by him; for he is entitled to the eral costs up to the point to which he was right in pur- g his action, viz. the time of paying the money into rt. For he was obliged to issue a writ, and to declare, rder to support the judgment he sought ultimately to

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recover. [*Pollock*, C. B.—It will be said, that if the payment into court had been general, the plaintiff might have taken the money out, and would then have got his costs; but instead of that, the defendants plead a payment into court of 15*s.* as to 15*s.*, and never indebted as to the rest, so that the plaintiff was driven to join issue, and go on to trial, or enter a nolle prosequi, and become conclusively liable to pay costs. *Alderson*, B.—On the plea of payment into court of 15*s.* as to 15*s.*, the plaintiff could not say the defendant was indebted to a larger amount. That made the plea of never indebted to the residue necessary.]

S. Temple, contrà.—*Cauty* v. *Gyll* (*a*) is in favour of the defendants. There there were five counts in debt, and six pleas, the last being a plea of payment of £30 into court. Issues were joined on the other pleas, and as to the sixth, the plaintiff took the £30 out of court in full satisfaction of all the causes of action as to the £30, parcel &c. The plaintiff was held not entitled to tax his costs under Reg. Gen. Trin. 1 Vict. [*Pollock*, C. B.—That case does not alter the plaintiff's argument. It was there attempted to tax the costs before the issues were disposed of, but the Court thought the attempt premature.] In *Cauty* v. *Gyll*, *Tindal*, C. J., says:—"I think the meaning of the rule must be, that the plaintiff shall be entitled to tax his costs only where the money is accepted in satisfaction of the whole demand, and not where there are other issues upon which the parties are proceeding to trial." [*Parke*, B.—There the plaintiff sought to recover the costs of all the replications to five different special pleas, but was held not entitled to any of them.] That decision resulted from the form of the pleadings. [*Parke*, B.—All the plaintiff was there entitled to, under the new rule, was the costs of suit for the cause of action in respect of which the money was

(*a*) 4 Man. & Gr. 907.

id into court, but not to the costs of the replications on ecial pleas, so that the taxation was properly set aside. e Lord Chief Justice's opinion was quite right, for the intiff had *taxed* the costs to that time, but does not hold ere there are other issues, &c. [*Platt*, B.—The princi- on which costs are dispensed under this rule, is settled *Goodee* v. *Goldsmith* (*a*). That was an action of assump- for 28*l.* 5*s.* money had and received, to which the de- lant, as to all except 3*l.* 5*s.*, pleaded non assumpsit; as ll except 3*l.* 5*s.*, a set-off of £25; and as to the 3*l.* 5*s.*, ment of that sum into court. The plaintiff by his ication admitted the set-off, and replied that he would further prosecute the suit against the defendant except o the sum of 3*l.* 5*s.*, and took that sum out of court on last plea. The Master having allowed the plaintiff on ation his whole costs, the Court reviewed the taxation, ng the defendant the costs on the general issue and set- as to which the plaintiff had in fact entered a nolle equi, and allowing the plaintiff costs as to that part of cause of action in respect of which the 3*l.* 5*s.* was paid court. For, as the replication amounted in effect to a e prosequi as to a count or part of a count, the costs owed by stat. 3 & 4 Will. 4, c. 42, s. 33.] The prac- hitherto has been never to tax any costs to plaintiffs in h cases.

POLLOCK, C. B.—This rule must be discharged, and with s, for the reasons I have already stated. We all agree he decision of my Brother *Alderson*, which he has stated s in a similar case.

PARKE, B.—If the plaintiff goes on to try and fails, he st pay the costs of the trial.

(a) 2 M. & W. 202. See *Williams* v. *Sharwood*, 3 Scott, 761; 3 Bing. N. C. 331.

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pleas of set-off replied the statute of limitations, on which issue was joined.

At the trial, before the late Mr. Justice *Williams*, at the last Spring Assizes at Chester, it appeared that the action was brought by the assignees of Mr. Ryle, who before his bankruptcy was a banker at Macclesfield, to recover the balance due upon a banking account of Mr. Turner, the defendant's testator. Mr. Ryle became bankrupt in 1841, at which time Mr. Turner had overdrawn his account to the amount of £1870. The defendant proved payment of £1015 to the plaintiffs before the commencement of this action, whereby the balance was reduced to £855, which he sought to cover by the set-off alleged in the second plea. In order to establish that plea, he proved that, in the year 1826, an account had been opened with the bank in the joint names of the defendant's testator and one Mawdesley (as trustees), on which interest appeared to have been allowed to them at the rate of 3 per cent. per annum down to the year 1832, when the balance due to them was stated at 918*l.* 13*s.* 8*d.*; but the books did not show any further transaction or entry relating to this account after that date, the balance remaining the same down to the period of the bankruptcy. Mawdesley died in January 1839. The testator's separate account, on which this action was brought, was opened with the bank at a later period than the account of Turner and Mawdesley; both were entered in the same ledger, the latter being headed "Messrs. Turner and Mawdesley," and there were separate pass-books for each. On the separate account of Mr. Turner, interest at 5 per cent. per annum was charged against him from time to time in the bank books, down to the period of the bankruptcy.

It was contended by the defendant's counsel, that, under these circumstances, the statute of limitations was no answer to the set-off; for that, first, there was a duty implied by law on the part of a banker regularly to enter up

the interest due upon the account of a customer, and so prevent the statute of limitations from attaching upon the debt; and secondly, that the two accounts were for this purpose to be taken as one, and the part payments in respect of the account entered to Turner's debit kept alive both. But they relied also upon the following facts, as amounting to acknowledgments in writing sufficient to prevent the operation of the statute. In the first place, the bankrupt, on his final examination, in June 1841, had entered in his balance sheet, which was signed by him, the sum of 918*l.* 13*s.* 8*d.* as due from his estate on the account of Turner and Mawdesley. Secondly, in the same year, an accountant employed by the assignees to wind up the affairs of the bank, had, by their direction, sent a letter to the defendant's testator, containing an unsigned copy of the entry in the ledger of the account between the bank and Turner and Mawdesley, in the following terms:—"Messrs. Turner and Mawdesley, Cr.—18*l.* 13*s.* 8*d.*"—The learned Judge expressed his opinion that the set-off was barred by the statute of limitations, and under his direction the plaintiff had a verdict on all the issues except the third, damages £1030, leave being reserved to the defendants to move to enter a verdict for them on the plea of set-off; the Court to be at liberty to draw any inference which a jury might properly have drawn from the facts proved.

In last Easter Term, *Chilton* obtained a rule nisi accordingly, against which cause was shown in Michaelmas Term, (Nov. 13th & 14th), by

The *Attorney-General* and *Welsby*.—The statute of limitations was a bar to the defendant's set-off. The relation between a banker and a customer who deposits money in his bank, is the ordinary relation of debtor and creditor, with the superadded obligation on the part of the banker, arising out of the custom of the trade, to honour

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the drafts of his customer; the breach of which duty is the subject of an action on the case, *Marzetti* v. *Williams* (*a*) or of an action of assumpsit, the tort being waived. But the deposit is no more than an ordinary loan. It was so expressly held by Sir *William Grant* in *Carr* v. *Carr* (*b*) and *Devaynes* v. *Noble* (*c*); by the Court of Queen's Bench in *Sims* v. *Bond* (*d*); and by Lord Chancellor *Lyndhurst* in *Foley* v. *Hill* (*e*), reversing the decision of Vice-Chancellor *Knight Bruce* in the same case (*f*). It has been held also, that money in a banker's hands will pass under a bequest of "ready money" in a will: *Parker* v. *Marchant* (*g*). The debt, therefore, which was due from the bankrupt to Turner and Mawdesley, was an ordinary debt, capable of being barred by the statute of limitations. Nor can it be said that the two debts—that due from Turner on the one hand, and that due to Turner and Mawdesley on the other—were so blended together as to form one account, and so to prevent the operation of the statute of limitations. The debt on the joint account of Turner and Mawdesley was kept altogether distinct from the other, and was barred by the statute of limitations before the death of Mawdesley in 1839, no interest having been paid in respect of it since 1832; whereas, on the debt of Turner to the bank, interest was charged at 5 per cent. down to the time of the bankruptcy. At all events, upon these pleadings the balance due to Turner and Mawdesley is treated as an ordinary debt, for money lent, to which therefore, primâ facie, the statute of limitations is applicable.

Secondly, as to the facts relied upon to take the case out of the statute. The account sent to the testator by the accountant was unsigned; and besides, the acknow-

(*a*) 1 B. & Adol. 415.
(*b*) 1 Meriv. 541, n.
(*c*) Id. 568.
(*d*) 5 B. & Adol. 38.
(*e*) 1 Phillips, 399.
(*f*) 13 Law J., N. S., Chanc. 182.
(*g*) 12 Law J., N. S., Chanc. 335.

gment signed by an agent is not sufficient: *Hyde* v. *son* (*a*). And the statement made by the bankrupt is balance sheet cannot affect his assignees, whose title not be defeated by any act done by the bankrupt r his bankruptcy. *Eicke* v. *Nokes* (*b*), which may be l as to this point, was an action against the bankrupt self.

hilton, *Townsend*, and *Egerton*, in support of the rule.— he argument on the other side be well founded, it ws that a banker, who neglects to balance the account is customer for six years, may keep for his own use the ey deposited with him by the customer, who may have abroad the whole time, and may have had no occasion raw a cheque. Surely that would be contrary to the y of the law. On the other hand, if a banker is in situation of an ordinary debtor, any person who de- s money with him might (before the recent altera- in the law of arrest) immediately afterwards have s an affidavit of debt against him, and arrested him. the true relation between the parties is this, that the er holds the money under a special contract to honour heques of the customer; who on his part cannot, so as the banker is solvent, support an action for thout a previous demand of it in writing. This view he case appears to be supported by the decision in *zetti* v. *Williams*. In Pothier on Contracts, by Evans, 2, p. 126, it is said—"Where a man deposits money e hands of another, to be kept for his use, the pos- on of the custodee ought to be deemed the possession e owner, until an application and refusal, or other l of the right; for until then there is nothing adverse; I conceive that, upon principle, no action should be red in these cases, without a previous demand; con-

(*a*) 2 Bing. N. C. 776. (*b*) 1 M. & Rob. 359.

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sequently that no limitation should be computed further back than such demand." In *Norton* v. *Ellam* (*a*), *Parke*, B., says—"Where money is lent simply, it is not denied that the statute begins to run from the time of the lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note payable on demand is a present debt, and is payable without any demand, and the statute runs from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the duty is continually increasing de die in diem. It is quite different from a note payable at sight, because there, by the terms of the contract, it must be shewn before the action is brought." This is analogous to the case of a note payable at sight, and therefore the statute did not begin to run until the bankruptcy, in 1841, rendered any formal demand of the deposit unnecessary. [*Rolfe*, B.—The passage cited from Evans's Pothier certainly goes to show that the money owing by a banker to his customer is not an ordinary debt, but one of a special nature, for which no action can be brought without a previous demand. But supposing that to be so, should you not have raised the question by your pleadings? Whereas here the plea treats it as an ordinary debt for money lent. *Parke*, B.—It has been held (*b*) that a plea of the statute of limitations admits the original debt, and only denies its having been due within the six years. It is therefore admitted by these pleadings, that the bankrupt was originally indebted to Turner and Mawdesley in the sum of 918*l.* 13*s.* 8*d.* for money lent; whereas you are now arguing that he never was.] Then the facts proved in evidence take the case out of the statute; for supposing the remedy to have been barred by the lapse of time in 1838, it has been revived by the payments made on Turner's account within the six

(*a*) 2 M. & W. 461. (*b*) *Gale* v. *Capern*, 1 Ad. & E. 102.

years, and after the death of Mawdesley. [*Parke*, B.—The fact of the bank charging interest on the money advanced by them to Turner, after the death of Mawdesley, is very strong evidence that that money was advanced by way of independent loan to Turner, and not by way of part payment of an antecedent debt.] But further, the admission of the bankrupt in his balance-sheet was a sufficient acknowledgment to take the debt out of the operation of the statute: *Eicke* v. *Nokes; Ex parte Seaber* (*a*). And although the account sent in by the accountant, by the authority of the assignees, might not be sufficient for this purpose, it constitutes a fresh cause of action on an account stated, within the fourth plea: *Smith* v. *Forty* (*b*), *Ashby* v. *James* (*c*). [*Pollock*, C. B.—It does not shew any consideration. *Parke*, B.—In *Ashby* v. *James*, the parties met and stated accounts, and struck a balance; that was equivalent to a payment by one, and a repayment by the other.]

Cur. adv. vult.

The judgment of the Court (*d*) was now delivered by

POLLOCK, C. B.—The question in this case is, how far the defendant is entitled to avail himself of an old banking account, on which a large balance has been standing for many years, and to which the statute of limitations would apply under ordinary circumstances. And a question arose whether this could be considered in any other light than an ordinary debt; there being, undoubtedly, several authorities in which it is distinctly laid down that money deposited in a banker's hands is equivalent to money lent; and the majority of the Court are of that opinion. I entirely concur

(*a*) 1 Deacon, 543.
(*b*) 4 C. & P. 126.
(*c*) 11 M. & W. 542.
(*d*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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in the judgment of the rest of the Court, that the set-off in the present case, cannot be made available; for even assuming that this account ought not to be treated as money lent, but that there are peculiar circumstances in a banking account which distinguish it from any other, yet none of those circumstances appear on these pleadings, so as to justify us in considering this case differently from what we should if it were an ordinary case of money lent; and I therefore concur with the rest of the Court, that the present rule must be discharged. At the same time, I must, certainly with considerable doubt and diffidence, confess the hesitation of my own opinion, whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. It seems to me that is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not. I could not concur in the judgment of the rest of the Court without expressing this doubt, in which, however, they do not partake, as they are of opinion that money in the hands of a banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer.

Rule discharged.

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Since the General Rule, Hil., 4 Will. 4, Part 2, Article 6, a count on a charter-party, going for demurrage and detention of the ship, cannot be joined with an indebitatus count for demurrage, and the latter count will be struck out as being in "apparent violation" of the above rule.

ASSUMPSIT on a charter-party. The first count stated, that, by a certain charter-party of affreightment, it was mutually agreed between the plaintiff, owner of the good ship or vessel called &c., of the measurement &c., then lying at Rochester, and the defendant, described as of &c., that the said ship, being tight, stanch, and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to Riga (Boldera), having liberty to take a cargo to Hamburgh, or to some intermediate port, or direct, or so near thereunto as she might safely get, and there load, from the agents of the said affreighter, a full and complete cargo of fir timber and deals, &c. &c., and, being so loaded, should forthwith proceed to Portsmouth, or so near thereunto as she might safely get, and deliver the same, on being paid freight at and after a certain rate in the said charter-party mentioned, all in full, and in lieu of all port charges and pilotages; restraint of princes and rulers, the act of God, the Queen's enemies, &c. &c.; always excepted; the freight to be paid on unloading and right delivery of the cargo in manner therein mentioned. Thirty running days were to be allowed to the said defendant, if the ship was not sooner despatched, for loading the ship at Riga and delivery at Portsmouth, and ten days on demurrage over and above the said laying days, at £5 per day. After the usual averment of mutual promises, the declaration averred that the ship, within a reasonable time after the making of the charter-party, was tight &c., and every way properly fitted for the voyage, and did with all convenient speed sail and proceed to Riga, without having taken a cargo to Hamburgh, or any other port, and afterwards, to wit, on the 28th of April, 1846, arrived at Boldera, being as near to Riga as the said vessel could safely get; and the

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master of the said vessel was afterwards, to wit, on the 6 of May, 1846, ready and willing to receive, and did aft wards, to wit, on 7th of May, 1846, begin to receive, and divers other days afterwards, to wit, until and upon t 25th of June, 1846, did receive on board the said vess from the agents of the defendant, a cargo of such goo mentioned in the said charter-party as the said agents te dered for the said vessel, and afterwards, to wit, on t 27th of June, 1846, being fully laden and despatched, d then set sail in and with the said ship and cargo and pr ceed to Portsmouth aforesaid, and being afterwards, to w on the 5th of August, 1846, arrived at Portsmouth afor said, did there, to wit, on the said 5th of August, gi notice to the defendant that the said vessel was so arrive as aforesaid, and ready to deliver her said cargo, and di there afterwards, to wit, on the 19th of August, 184 make a right and true delivery of the said cargo, accordin to the terms of the said charter-party. Averment, that th defendant, not regarding his said promise, did not no would, within the number of days allowed by the said char ter-party as aforesaid in that behalf, load and discharge th said goods &c. in the said charter-party mentioned; an on the contrary thereof, the plaintiff in fact says, th the defendant kept and detained the said ship or vessel ov and above the said thirty running days and the said te demurrage days at Riga and Portsmouth, to wit, for th space of eleven days at Riga, and thirteen days at Port mouth, whereby the plaintiff was put to great cost charges, and expenses, amounting, to wit, to £200, in a about the maintaining and keeping the master and marine of the said ship or vessel. And the plaintiff further say that by reason of the premises, a sum of money, to wit, t sum of £50, as and for demurrage for the detention of t said ship or vessel for the days of demurrage in the a charter-party mentioned, became due and payable to t plaintiff according to the terms of the said charter-par

whereof the defendant hath always had notice, yet the defendant, not regarding &c., hath not as yet paid the last-mentioned sum of money, or any part thereof, &c. Second count, indebitatus assumpsit in £200, for demurrage.

Pleas, first, non assumpsit to the whole declaration; second, to the first count, that the said ship did not sail and proceed to Riga, in manner and form as in that count alleged; third, to the first count, that the said ship did not arrive at Boldera, in manner and form &c.; fourth, to the first count, that the said vessel did not arrive as near to Riga as she could safely get, in manner and form &c.; fifth to so much of the first count as related to keeping and detaining the said vessel for the said alleged space of time over and above the said thirty days in the said charter-party mentioned, and over and above other ten demurrage days, to wit, the ten other demurrage days in the said first count mentioned, the defendant says, that he did not keep or detain the said ship or vessel over and above the said thirty running days in the said charter-party mentioned, and over and above other ten demurrage days, to wit, the ten other demurrage days in the said first count mentioned, for the space of time in the first count in that behalf mentioned, or any part thereof; sixth, to so much of the first count as relates to the days of demurrage in the said charter-party mentioned, the defendant says, that he did not keep or detain the said vessel for the days of demurrage in the said charter-party mentioned, or any of them, or any part thereof. All the pleas concluded to the country.

A summons for striking out the indebitatus count having been dismissed at chambers by *Platt*, B., *Greenwood* obtained a rule for that purpose (*a*).

(*a*) See *James* v. *Bourne*, 2 Bing. N. C. 420.

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S. Temple now shewed cause.—The plaintiff relies on Reg. Gen., Hil., 4 Will. 4, Part 2, Art. 5, as shewing that these counts may be joined, by analogy to the permission there given to join a count for freight on a charter-party with a count for freight pro ratâ itineris, on a contract implied by law; and a count on a bill of exchange with one for its consideration in goods or otherwise. [*Parke*, B.—The plaintiff asks for the same thing twice over. Why not strike out all of the first count which goes for demurrage? It does not arise from a subsequent implied contract, as a claim pro ratâ itineris does (*a*).] Several cases shew that the question, as to admitting a second count, turns upon this, whether or not it *necessarily* appears on the face of the count that it is for the same subject-matter of complaint. The first count is for demurrage specially agreed for at so much a day, and for damages for the detention. [*Parke*, B.—Demurrage is specially agreed on at £5 a day for ten days; after that day the claim is for detention.] Suppose the ship did touch at Hamburgh, though the declaration avers that she did not, the plaintiff would fail on the first count. So, if her direction was altered by the owners during the voyage, and she went elsewhere, the second count would be requisite; for all the cases shew that the particulars delivered with the declaration do not govern the pleadings at all (*b*). [*Parke*, B.—Is not the joinder of these counts in "*apparent violation*" of the new rule (*c*)? The first count is for demurrage, as well as the second. The case of two counts in an action on a bill is different, for one count is on the bill as a security, and the common count is for the original debt, that being a different cause of action.] The words of the Rule, 4 Will. 4, Part 2, Art. 6, are "*apparent* violation;" but these counts do not necessarily *on the face of them* appear to be the same.

(*a*) See Abbott on Shipping, 6th Edition, 387.

(*b*) See Tyrwhitt on Pleading, 62, cases collected.

(*c*) See Reg. Gen., Hil., 4 Will. 4, Part 2, Art. 6.

In *Cahoon* v. *Burford* (*a*), the first count was in assumpsit to recover damages for breach of the warranty of a horse; the second was in indebitatus assumpsit for money had and received, viz. the price of the horse, as money advanced on a consideration which had failed. *Alderson*, B., said, "The only question is, does it appear on the face of the second count that it is for the same cause of action as the first? It seems to me plain, that it is not for the same cause of action:" and both counts were allowed to stand. *Williams* v. *Vines* (*b*) was assumpsit by assignees of a bankrupt; and there counts for money received by the defendant to the use of the bankrupt, and on an account stated by the defendant with the bankrupt, were allowed to be joined with counts for money had and received, and on an account stated with the plaintiffs as assignees; *Patteson*, J., saying, "I do not see that these counts are necessarily for the same cause of action. In point of fact, they seem to be otherwise; for money received to the use of the bankrupt could not be recovered on counts stating it to be received to the use of the assignees, and è converso." Here the first count rests on the special terms and conditions of a written agreement between the parties. The second proceeds on the quantum meruit for earnings of the ship, without any such terms. [*Alderson*, B.—The question is, whether the plaintiff bonâ fide believed that such a doubt exists, e. g. whether the ship has or has not touched at Hamburgh, so as to make the second count requisite. What the general rule intends to put a stop to, is the insertion of counts on a mere imagination of the pleader. *Parke*, B.—The new rule specially provides for permitting a count on a bill to be joined with a count for its consideration in goods sold, &c., for such joinder is in "apparent violation" of the rules. Again, a count on a demise of land cannot be joined with a count for use and occupation of the same

(*a*) 13 M. & W. 136. (*b*) 1 Dowl. & L. 710.

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land for the same period, though it might with counts for use and occupation at a different time.] In *Vaughan* v. *Glenn* (*a*), the first count was on a charter-party, whereby the defendant agreed to sail to Honduras, and there take on board a full cargo of mahogany, &c., and therewith proceed to London or Liverpool, and deliver the same, on being paid freight &c. Breach, that part of the cargo delivered by plaintiff at Honduras and received by the master and crew, was not carried or delivered according to the agreement. The second count stated, that in consideration that the plaintiff had caused certain goods, to wit, &c., to be taken to and loaded on board the defendants' vessel in the bay of Honduras, to be conveyed to England, for reasonable freight &c., the defendant promised the plaintiff that due and proper care should be taken of the goods till they were loaded; but on the contrary, by the defendants' negligence, the goods, after they were delivered to them, and whilst in their custody to be loaded, were wholly lost. Lord *Abinger* said, "I think these counts ought to stand. Under the first, the plaintiff must prove a breach of the charter-party, otherwise he makes out no case. Then, if it turns out on the construction of the charter-party, or by usage, that it does not extend to cover liability between the shore and the ship, the plaintiff seeks by the second count to recover for the breach of the contract implied by law to take care of the goods from the shore to the ship." And *Parke*, B., added, "These are really different contracts: in the first count, the plaintiff goes on the charter-party; in the second, on a contract to which the charter-party may not be applicable." Here the second count is requisite, because the defence is that the ship's arrival at Boldera (near Riga) was not according to the plaintiff's agreement. [*Parke*, B.—You treat one part of the demand in the first count as exec-

(*a*) 5 M. & W. 577.

tory, which in your second you treat as executed. Again, the first count goes for two causes of action, demurrage and detention, and the second for demurrage. Is not that an apparent violation of the rule? *Alderson*, B.—If the second count were necessary, and justified by any real reason for it, it would not *appear* to be a violation of the rule; and if you really believe it to be requisite, you might safely give the undertaking to that effect.] That cannot be risked, as the Judge at Nisi Prius may have another view, and may refuse any amendment at the trial. [*Parke*, B., alluded to *Bourne* v. *Gatliff* (*a*).]

Greenwood, in support of the rule.—In *James* v. *Bourne* (*b*) there were two distinct contracts, that in the first count being to carry goods from Belfast to Dublin, and from Dublin to the port of London; that laid in the second being a contract to carry the same goods from the wharf at which they should be landed in London to the plaintiff's place of business; and *Tindal*, C. J., said, "The second count relates to the same subject-matter as far as the goods are concerned; but it is on a separate and distinct contract as to the defendant's undertaking, i. e. to carry the goods from the place of their landing at the port of London to the plaintiff's place of business. The instances put in the rules themselves shew that a 'distinct matter of complaint' means, in cases of contract, a separate contract." [*Alderson*, B.—In that case there were two special contracts in two separate counts.] The plaintiff's case is rested on there being here no "apparent violation" of the new rule against several counts. Now, without relying on the particulars, the subject-matter of complaint is clearly the same in both, which shews that the second is in such

(*a*) 11 Cl. & F. 45; 8 Scott, N. R. 604.
(*b*) 4 Bing. N. C. 420, 423.

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"apparent violation." The case of a count on a demise of a house, and another for use and occupation of it, would be this case, were "ship" read for "house." The fact of there being a condition precedent in the first count does not justify a second. [*Parke*, B.—This case resembles a count in assumpsit for rent on the demise of a house, and for not repairing it, joined with a count for use and occupation of the house. Whether the causes of action were different, might be put to the test by giving the undertaking. However, there the violation of the rule against several counts is apparent. These instances in the rules are merely given as examples. As to the instance of freight "pro ratâ itineris" in the rule, the plaintiff might have a count for the rate of a voyage already performed, so as to make all safe.]

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

POLLOCK, C. B.—The majority of the Court is of opinion that the first count on the charterparty for demurrage cannot be joined with the second count, which is an indebitatus count for demurrage. The plaintiff may either strike out so much of the first count as relates to demurrage, retaining that part which relates to the damage for detention, or he may retain the whole of the first count, and strike out the second.

PLATT, B., dissented, retaining the opinion he had formed at Chambers, that the counts might be joined.

Rule absolute.

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Jan. 28.

BOYD and Another v. MANGLES, PRICE, and MOORE.

The plaintiffs and defendants being, by agreement between them, jointly entitled to the benefits of a charter-party, the plaintiffs assigned their interest in it, by indorsement, to D. their creditor, at the same time giving the defendants notice of such assignment, and afterwards became bankrupts. The assignees of the charter-party having sued upon it in the names of the plaintiffs, the defendants pleaded the bankruptcy of the plaintiffs, by which the right to their choses in action vested in their assignees. Replication, setting forth the assignment by the plaintiffs of their interest in the charter-party to D., and notice to the defendants that assignment given by them before the bankruptcy of the plaintiffs, and that the plaintiffs d on account of D. Rejoinder (after terms to rejoin gratis and issuably had been imposed), ting up the previous agreement between the plaintiffs and defendants, that they should share benefits of the charter-party, by way of a mutual credit between the parties, on which an ount should be stated, and one demand set against the other, under 6 Geo. 4, c. 16, s. 50: Held, not issuable, and bad in substance, for at the time of the bankruptcy no mutual credit ted between the plaintiffs and defendants.

ASSUMPSIT for freight due on a charter-party of freightment of the ship "Fifeshire," dated 23rd of April, 845, with a second count for the use and hire of the plaintiffs' ship, and a third on an account stated (a).

Pleas, by all the defendants:—1. non-assumpsit; 2. that, ter the making of the charter-party, and before the commencement of the suit, the plaintiffs became bankrupts, d (after setting out the fiat and other proceedings) averg that certain persons named were appointed assignees of eir estate and effects, who, as such assignees, were entitled the sums of money and causes of action in the declaraon mentioned and supposed, and to all benefit thereof and terest thereon. Verification.—To that plea the plaintiffs plied, that long before they became bankrupts, as in that ea mentioned, to wit, on the 1st of December, 1845, the aintiffs, then being indebted to Dixon & Co. in a large m, exceeding all the monies in the declaration mentioned, d thereby sought to be recovered, to wit, £12,000, in nsideration thereof did, by an order in writing, indorsed the said charter-party and addressed to the defendants, quest them to pay to Dixon & Co., or their order, all ms of money which from that date, to wit, &c. should come due under and by virtue of the said charter-party, and in respect of the hiring of the said vessel, according the terms thereof, and then delivered the said charterrty, with the said order so indorsed thereon, to Dixon

(a) See *Mathewson* v. *Ray*, ante, 329.

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& Co., which said order, so indorsed as aforesaid, wa afterwards, and before the said bankruptcy of the plaintiff to wit, on &c., shewn by Dixon & Co. to the defendant who thereby then, and before the said bankruptcy, ha notice thereof; and the plaintiffs say, that they the plaintiff did then, and before the bankruptcy, to wit, in the man ner aforesaid, for the consideration aforesaid, assign an make over to the said Dixon & Co. all the right an interest of them the said plaintiffs of and in the said sum of money so to become due under and by virtue of the said charter-party as aforesaid; and the plaintiffs further say, that as well the said monies in the said first count alleged to be and remain due and unpaid to the plaintiffs for and in respect of the hire of the said vessel, as the said monies in the second count alleged to be due to the plaintiffs from the defendants, for the use and hire of the said ships and vessels of the plaintiffs, are and were monies which became due to them from the defendants under and by virtue of the said charter-party, according to the terms and stipulations thereof, after the said 1st of December, 1845; and that the said account in the last count mentioned to have been stated between the plaintiffs and the defendants, was so stated between them upon, for, and in respect of the said monies in the said first and second counts respectively alleged to be due from the defendants to the plaintiffs, and not otherwise; and that as well before and at the time when the plaintiffs became bankrupt as aforesaid, as from thence continually until and at the commencement of this suit, the plaintiffs were indebted to Dixon & Co., in re spect of the monies so owing at the time of the said assign ment, in a large sum of money, far exceeding the said monies so due from the defendants as aforesaid under and by virtue of the said charter-party, and in the declaration mentioned, to wit, £12,000, and that they the plaintiffs sue in this action for the account and benefit of Dixon & Co., and not on their own account, or for their own benefit. Verification.

The defendants, after being placed under terms to rejoin gratis and issuably, severed in their rejoinders. The defendant Price rejoined to the replication to the above plea, that the defendants chartered the said ship as in the declaration mentioned, for the purposes of a certain adventure of trade, for the bringing home a cargo of guano from certain places beyond the seas, at the risk and expense and for and on account of the defendants, and that after the making of the said charter-party, and before the issuing of the said fiat, and before the defendants had notice of any act of bankruptcy by the plaintiffs committed, and before the assignment in the replication mentioned, to wit, on the 24th of April, 1845, by a certain agreement then made, it was mutually agreed by and between the defendants of the one part, and the plaintiffs of the other part, that the trading which should be carried on, and all cargo and produce which should be sent on board the said ship in pursuance of the said charter-party, and all benefits and advantages which should be derived therefrom, should be for and upon the joint account and risk of the defendants of the one part, and the plaintiffs of the other part, in equal proportions, and that after payment or deduction of the freight, and all incidental expenses, the profit or loss which should arise should be borne and received or paid by the said parties in equal moieties. Averment, that the said ship afterwards, on the day and year in the declaration mentioned, sailed on the said voyage and adventure, and continued absent in the prosecution thereof for a long space of time, to wit, until the day and year next hereinafter mentioned, and afterwards, to wit, on the day and year in that behalf in the declaration mentioned, the said vessel returned from the said adventure and voyage, and arrived, to wit, at the port of London, with a certain cargo of guano on board, which cargo had been sent on board the said ship in pursuance of the said charter-party, and for and on account of the said adventure; and the said cargo was then landed at

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the said port, and was then sold for the best price th could reasonably be gotten for the same, to wit, £171 Averment, that all disbursements, expenses, and charg upon or in respect of the said joint adventure, were fro time to time made, paid, and defrayed by the said defendan alone, out of their own proper monies, to wit, to tl amount of £10,000; and so this defendant says that the to wit, in manner aforesaid, gave credit to the plaintifl which credit was such as to be likely to terminate in liability in the nature of a debt from the plaintiffs to th defendants; and this defendant says, that before the com mencement of the suit, all demands, charges, disbursement and liabilities of the plaintiffs and defendants, to or toward all other persons whatsoever, for or on account of the sai joint adventure, had been satisfied, made, and paid by th defendants, amounting, to wit, to the sum of £10,00 above mentioned, and that there was not, at the time o the liquidation of account hereinafter mentioned, any lia bility remaining outstanding to any other person or person whatsoever, on account or in respect of the said adventure and the whole of the proceeds of the said adventure, to wi the said £1715, had at the time of such liquidation of ac count been received by the defendants for and on account o the said adventure, and the accounts of the said adventu were before the commencement of this suit, to wit, on &c finally closed and liquidated, and the state of the sai accounts was then finally ascertained. Averment, th upon the said liquidation of accounts, there was then fou to be and was a large loss on the said adventure, to wit, £8000, and the plaintiffs' part, share, and moiety of tl said loss amounted to £4000, of which several premis the plaintiffs then had notice, and the said credit so giv by the defendants to the plaintiffs did then, before t commencement of this suit, terminate in a liability in t nature of a debt from the plaintiffs to the defendants, whi debt or liability, before and at the time of the commenc

ment of this suit, was, and thence hitherto hath been and still is outstanding, and unpaid, and unsatisfied to the defendants, and exceeds in amount all damages due from the defendants in respect of the causes of action in the declaration mentioned. Averment, that the fiat of bankruptcy is still open, and that no final dividend has been declared under the same, and that the defendants are no otherwise indebted or liable to the estate of the plaintiffs than in respect of the causes of action in the declaration set forth, and that upon an account duly stated according to the form of the statute in such case made and provided, there is no balance due from the defendants in respect of the causes of action mentioned in the declaration. Verification.

The defendant Moore also rejoined matters nearly resembling the above rejoinder.

The plaintiffs signed judgment as for want of rejoinders against the defendants Price and Moore (*a*), treating the above rejoinders as not issuable (*b*). A summons to set aside the judgment was dismissed with costs by *Platt*, B. *Peacock* afterwards obtained a rule nisi to set aside the judgment.

Martin shewed cause.—First, these rejoinders are a departure from the plea: *Waterfall* v. *Glade* (*c*), *Cuming*

(*a*) The defendant Mangles rejoined issuably, and the plaintiffs surrejoined.

(*b*) *Hitchcock* v. *Walford*, 6 Scott, 792, has been cited in 2 Archbold's Practice, by Chitty, 280, as shewing that if there are several pleas to the same cause of action, and the defendant neglect to rejoin, &c. in respect of one of them, the plaintiff cannot sign judgment, but ought to apply to the Court, or a Judge, to strike out the plea which the defendant has abandoned by not rejoining, &c. But *quære;* for as the defendant's neglect to rejoin makes the record imperfect, and hinders the plaintiff from going to trial, judgment may be signed, and will stand, unless on the *defendant's* application the previous pleading to which there is no rejoinder be struck out.

(*c*) 3 T. R. 305.

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v. *Sharland* (*a*), *Serle* v. *Bradshaw* (*b*). The substance of the plea is, that the right of action has passed from the plaintiffs to certain assignees in bankruptcy; whereas the rejoinder is, that the defendants Price and Moore respectively have a set-off by way of mutual credit against the plaintiffs' claim. That admits the right of action in the plaintiffs. [*Parke*, B.—The rejoinders do not confess and avoid the title laid in the previous pleadings in the assignees, after which, and notice of it to the defendant Mangles, the mutual credit is at an end.] They are also bad in substance; for the replication shews that the plaintiffs were suing as trustees, in respect of their legal interest in the subject of the action, and that their right to sue is not affected by the bankruptcy; yet the defendants endeavour to avail themselves of the incidents of the bankruptcy to defeat their claim. Nor do the rejoinders shew any thing which would necessarily terminate in a debt to be set off. Again, the debts and credits cannot be mutual, for they are not in the same right.

Peacock, in support of the rule.—The rejoinder in question sets up an agreement that the benefits of the charter-party sued on should go in moieties to the plaintiffs and defendants. This was a good rejoinder of mutual credit, within 6 Geo. 4, c. 16, s. 50, and a defence to the action. Even supposing it a departure from the plea, that is only the subject of special demurrer. [*Parke*, B.—The chose in action was assigned to Dixon & Co. prior to the act of bankruptcy.] 6 Geo. 4, c. 16, s. 50, provides, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any person, the commissioners shall state the account between them, and one debt or demand (*c*)

(*a*) 1 East, 411.
(*b*) 2 C. & M. 148; 4 Tyr. 69.
(*c*) See 46 Geo. 3, c. 135, s. 3, and 1 Bing. N. C. 754.

may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him, and what shall appear due on either side of the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." The benefit intended by this enactment cannot be devested, or the mutual credit terminated, by the mere act of one of the parties to it, in assigning the chose in action on which it arose the day before his bankruptcy. [*Parke*, B.—The act means an account subsisting at the time of the bankruptcy.] In *Gibson* v. *Bell* (*a*), the object of the mutual credit clause, from the earliest practice of allowing a set-off in cases of mutual credit to the latest provision by statute, is stated by the Court to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off. Were this otherwise, either party to a mutual credit might always strike off that of the other party, so that he should only come in for his dividend, and lose his set-off. Under 6 Geo. 4, c. 16, s. 50, the assignees of the debt to the plaintiffs can only sue in their names. Before the chose in action on the charter-party was assigned by the plaintiffs, it was affected by the mutual credit between them and the defendants. [*Parke*, B.—The fallacy lies in this, that the contingency on which mutual accounts were to be taken between the parties does not happen. The equity is not that the debt shall not be transferred, but that on that contingency happening mu-

(*a*) 1 Bing. N. C. 743, 754.

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tual accounts shall be taken. Here the defendants do shew themselves entitled to mutual credit. As the assi ment was before the bankruptcy, there is an end of mut credit. That equity can only exist in the event of occurrence of a bankruptcy of one of two parties during existence of a mutual credit between them. The defend cannot say there was any agreement, express or impli that the defendants should pay themselves out of freight. The guarantee was not complied with, so equity arises. Had the bankruptcy occurred at the ti both debts were due, there would have been a set-off; b here there was no bankruptcy before the assignment Dixon & Co.] This is not an objection to the replicati on general demurrer. The rejoinders are issuable, for t plaintiff can take issue on them, go to trial, and have t merits raised either in law or fact. [*Parke*, B.—We s not merely that the rejoinders are a departure, but th they are bad in substance, and do not answer the replic tion. Were there only a departure, the rejoinders oug not to be struck out only on the ground of being no issuable. But all they shew is, that if this debt had r mained due to the Boyds at the time of their bankrupt the defendants would have had a set-off. Dixon & C can only take Boyd's legal rights. The defence you up could only prevail if the assignment by the Boy to Dixon & Co. had been made, and no bankrupt of the Boyds had followed. No equity arises under t statute, unless a mutual credit existed *at the time of bankruptcy*. It is true that no nominal assignment o debt before the bankruptcy of one of the parties to a n tual credit would alter it. *Alderson*, B.—A general, or, it has been said, a fair demurrer, is an issuable plea (a Had this matter been put on the record as a plea, it co

(*a*) Tyrwhitt on Pleading, 145. See *Steele* v. *Harmer*, 14 M. W. 136.

only have been open to special demurrer; then how, when rejoined, can it be struck off the record? [*Alderson*, B.—If the assignment is true, there can be no substantial defence. The rejoinders admit that the assignment to Dixon & Co. was before the bankruptcy, and that the charter-party did not pass to the bankrupt's assignees. The truth of the replication is thus admitted, yet the defendants say that they are entitled to a mutual credit, though they have already admitted they had assigned it to another person before the bankruptcy.]

ALDERSON, B.—The plaintiffs had power to assign their interest in the charter-party at the time they did so, and the proceeds would pass under that assignment. 6 Geo. 4, c. 16, s. 50, is intended to protect debtors.

PARKE, B.—If your right of set-off only grows out of the bankruptcy of the assignors, that equity has not arisen, for the assignment was before their bankruptcy. Dixon & Co. can take no more than the legal rights of Boyd & Co.

Rule discharged, with costs.

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IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer*).

Jan. 19.

PRICE *v.* GREEN, Executor of JOHN GOSNELL, deceased.

By deed, reciting that A. & B. carried on business as perfumers in partnership, and that it had been agreed between them that B., in consideration of £2100, should assign to A. his moiety of the good-will, stock in trade, &c. of the co-partnership, B., in consideration thereof, covenanted that he would not, during his life, carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same respectively; and for the observance of this covenant, he bound himself to A., his executors, &c., in the sum of £5000, by way of liquidated damages, and not of penalty:—*Held*, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that this covenant was divisible, and was good so far as it related to the cities of London and Westminster, though void as to the 600 miles; that a breach, that B. carried on the trade in the city of London, was good; and that A. was entitled to recover, in respect of such breach, the whole sum of £5000.

Quære, whether a bill of exceptions lies for misdirection of a judge on the execution of a writ of inquiry.

THIS was an action of covenant, for the breach of a covenant by the plaintiff in error (the defendant below), contained in an indenture made between him and John Gosnell, deceased, whereby he covenanted not to carry on the trade of a perfumer, toyman, and hair-merchant, within the cities of London or Westminster, or within the distance of 600 miles from the same respectively; and for the observance of which covenant the defendant bound himself, his executors, &c., in the sum of £5000, as and by way of liquidated damages, and not by way of penalty. The defendant set out the deed on oyer, and then pleaded, that the cities of London and Westminster, and the distance of 600 miles from the same respectively, comprised the whole of England and Wales, and 19-20ths of Scotland, and that the covenant was therefore void in law.

To this plea there was a demurrer, on which the Court of Exchequer gave judgment for the plaintiff below (*a*).

On the execution of the writ of inquiry, before *Pollock*, C. B., the jury, under the direction of the learned Judge,

(*a*) 13 M. & W. 695.

assessed the damages for the breach of covenant at the full sum of £5000. To this direction the defendant's counsel tendered a bill of exceptions.

A writ of error having been brought, the case was argued in this Court, in Michaelmas Vacation, 1845 (Dec. 1), (*a*) by

Cowling for the plaintiff in error.—First, this covenant is not enforceable at law, for it amounts to an illegal restraint of trade. And it is an entire, and not a divisible, covenant; and even if, according to the judgment of the Court below, the covenant not to carry on the trade in London and Westminster would of itself be good, that part is not separable from the rest of the covenant. It is one entire engagement, not to carry on the trade within a certain district, which is defined to be the cities of London and Westminster, and a circuit of 600 miles from them. To confine it to London and Westminster only, is to frame a new bargain for the parties, which they have not made for themselves. It is clear that part of a covenant which is illegal cannot be rejected, if the covenant be entire: *Lowe* v. *Peers* (*b*). There the covenant was not to marry any one but the plaintiff, and to pay a sum of money to the plaintiff on marrying another. That was just as divisible as the present covenant, yet it was held to be entire and void. In *Bunn* v. *Guy* (*c*), where the covenant was not to practise as an attorney in London, or within 150 miles of it, the divisibility of the covenant was only suggested in argument, but not noticed by the Court. In *Horner* v. *Graves* (*d*), a covenant not to practise as a dentist within 100 miles of York was held void, and no

(*a*) Before *Tindal*, C. J., *Patteson*, J., *Williams*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., *Wightman*, J., and *Erle*, J.

(*b*) Wilmot's Notes, 364.

(*c*) 4 East, 190.

(*d*) 7 Bing. 735; 5 M. & P. 738.

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suggestion was made as to the divisibility of it. [*Patteson*, J.—There the breach was assigned on the illegal part of the covenant.] In *Hinde* v. *Gray* (*a*) the breach was not so limited. There the covenant was not to carry on the trade of a brewer "in Sheffield or elsewhere;" the breach was for carrying on the trade "in Sheffield and elsewhere," and the covenant was held void; whereas it is clear that, if it could have been divided, it might have been held good as far as regarded the town of Sheffield. In *Davis* v. *Mason* (*b*), which may be relied upon on the other side, the covenant was held good on the ground that the limits of the restraint were not unreasonable. The same observation applies to *Chesman* v. *Nainby* (*c*). Here the covenant, taken altogether, is clearly an unreasonable restraint of trade, for it extends throughout England, and almost the whole of Scotland. The Court below decided this case entirely on the authority of *Mallan* v. *May* (*d*); but it is submitted that that is a decision which ought to be reviewed.

Secondly, even if the judgment on the demurrer was right, the Lord Chief Baron was wrong in holding that the plaintiff below was entitled to recover the whole sum of £5000 or liquidated damages. By the judgment on the demurrer, the contract is altered and limited; why then should the defendant still pay the whole sum for the breach of it? Surely the penalty for trading in London and Westminster ought to be much less than for trading throughout so large a space as that mentioned in the covenant. Supposing the covenant were not to practise in three or four specified counties, and that were considered an illegal restraint of trade, which of the counties would the Court reject as making it unreasonable? It is clear

(*a*) 1 Man. & G. 195; 1 Scott, N. R. 123.
(*b*) 5 T. R. 120.
(*c*) 2 Stra. 739; 2 Ld. Raym. 1456.
(*d*) 11 M. & W. 653.

that the £5000 was to be the price paid for a practising in any or every part of the whole district mentioned in the deed.

Martin, contrà.—First, the judgment of the Court below on the demurrer was right. There is no stipulation in this deed for a monopoly. It is merely the sale of the good-will of a business, and, incidental to that sale, an agreement by the seller not to do that which would defeat the object of the purchaser. It is said that the covenant cannot be enforced as to the cities of London and Westminster, because in its terms it extends also 600 miles beyond those places; but *Chesman* v. *Nainby*, which was a judgment of the House of Lords, is directly in point to the contrary; and although that was an action on a bond, it does not in this respect differ from the case of a covenant. [*Patteson*, J.—It was argued the other day, in a case of *Nicholls* v. *Stretton* (*a*), that a bond and a covenant differ in this respect, the bond being one-sided, whereas, in the case of a covenant, if the consideration was illegal, the whole fell to the ground.] A deed is equally obligatory whether it contain a consideration or not. Besides, it is to be remembered that the other part of the covenant is not *illegal*, but only *void* as being unreasonable. There is a great difference between a contract which the law will not enforce, and one which is absolutely illegal. The whole of the law on this subject was fully gone into in the case of *Mallan* v. *May*, which was decided after great consideration. The cases referred to on the other side do not bear upon the question. *Lowe* v. *Peers* was clearly an entire contract not to marry with any other person than the plaintiff. In *Davis* v. *Mason* this point did not arise; nor was it raised in *Horner* v. *Graves*, *Bunn* v. *Guy*, or *Hinde* v. *Gray*.

(*a*) Q. B., Hil. T., 1847; not yet reported.

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Secondly, no bill of exceptions or writ of error lies misdirection on the execution of a writ of inquiry, wh is said, in *Bruce* v. *Rawlins* (*a*), to be a mere "inqu of office." In *Gould* v. *Hammersley* (*b*), it was assigned error that there was no execution of the writ of inqu entered upon the record, and this was held not to be er on the ground that the execution of the writ of inqui might be dispensed with, and final judgment given for certain sum with the plaintiff's assent. The cases on th subject are collected in *Holdipp* v. *Otway* (*c*), and th shew that the Statute of Westminster 2nd applies only writs of Nisi Prius. A Judge, sitting on the execution a writ of inquiry, is merely in the character of an assess to the sheriff; per *Holt*, C. J., *Anon.*, 12 Mod. 610.—E cited also, on this point, *Hewit* v. *Mantell* (*d*) and *Watt Smales* (*e*).

But, thirdly, the ruling of the Lord Chief Baron w correct. The covenant was incidental only to the sale the good-will; and the very object of fixing the damag was to render that certain which would otherwise l uncertain. The only question really is, whether the co tract has been broken; if it has, the parties have assess the damages for themselves. It is not a penalty for t breach of a number of stipulations of various degrees value, as in *Kemble* v. *Farren* (*f*).—He referred also *Gainsford* v. *Griffith* (*g*), and the cases there collected.

Cowling, in reply.—If, as is said on the other side, t £5000 was to be paid in case the trade should be carri on *anywhere* in London and Westminster or within t 600 miles, then the covenant is void, as being too lar Secondly, the bill of exceptions will lie in this case. T

(*a*) 3 Wils. 61.
(*b*) 4 Taunt. 148.
(*c*) 2 Saund. 105 *a*.
(*d*) 2 Wils. 372.
(*e*) Barnes, 135.
(*f*) 6 Bing. 141; 3 M. & 425.
(*g*) 1 Saund. 58.

language of the Statute of Westminster 2nd is very large—"before any of the justices;" and being a remedial law, it ought to be construed liberally. It has been held, accordingly, to extend to a trial at bar; *Thurstan* v. *Slatford* (*a*): and to a sheriff in the county court; *Strother* v. *Hutchinson* (*b*). [*Maule*, J.—Would it lie to a sheriff executing a writ of inquiry, or to the master computing principal and interest?] The reason given by Lord *Coke*, in the 2nd Inst., 427, applies strongly to such cases. He says that the statute extends not only to all courts of record, but to the county court, the hundred court, and court baron, "for therein the Judges are more likely to err."

Cur adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.—This was an action of covenant, by the executor of John Gosnell, against the defendant, for the sum of £5000 as liquidated damages, for the breach of a covenant contained in an indenture, which is set out on oyer upon the record.

It appears by the indenture, that Gosnell and the defendant had been partners as hair-dressers and perfumers in London. The partnership was agreed to be dissolved; and Gosnell purchased the defendant's share of the business at £1500, and also his share of certain leasehold premises at £600, and his share of their stock in trade at £4149 18*s.* 6*d.*, secured by bond. The £1500 is recited to have been paid; and the covenant of the defendant is in these words:—"And in pursuance and performance of the agreement in this behalf, and in consideration of the said sum of £1500 to the said Rees Price by the said John Gosnell paid as hereinbefore mentioned, he the said John Rees doth hereby covenant, promise, and agree with and

(*a*) Lutw. 905 a. (*b*) 4 Bing. N. C. 83.

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to the said John Gosnell, his executors, administrators, ar assigns, that he the said Rees Price shall not nor will, a any time during his life, either by or for himself, or for a with any person or persons whomsoever in trust for hin or to or for his benefit or advantage, use, exercise, or carr on, within the cities of London or Westminster, or withi the distance of 600 miles from the same respectively, th trade or business, or trades or businesses, of perfumer, toy-man, and hair-merchant, or any other trade or business lately carried on by them the said Rees Price and John Gosnell in copartnership together, under the hereinbefore-mentioned articles of copartnership of the 1st of January, 1829. And for the due observance and performance of this covenant by and on the part of him the said Rees Price, he the said Rees Price doth hereby bind himself, his heirs, executors, and administrators, to the said John Gosnell, his executors, administrators, and assigns, in the sum of £5000, as and by way of liquidated damages, and not of penalty."—The declaration then states a breach of this covenant, by the defendant carrying on the business of a perfumer in the city of London. The defendant pleads, that the cities of London and Westminster, and 600 miles from the same, include all England, whereby the indenture is void. To the plea the plaintiff demurs, and judgment has been given for him in the Court below.

Upon the argument in this Court, it is conceded that the covenant is void, so far as regards the distance of 600 miles from London and Westminster; but it is contended for the defendant in error, that the covenant is divisible, and stands good so far as regards the cities of London and Westminster, upon which part of it the breach is assigned. The case of *Mallan* v. *May*, in the Court of Exchequer (a), is an express decision upon the point, in favour of the defendant in error; but having been decided very recently,

(a) 11 M. & W. 653.

the present writ of error is in truth brought to question that decision, as much as the judgment in the principal case.

Had the words of this covenant formed part of the condition of a bond, it cannot be denied that they might be taken separately; for that point has been expressly decided in *Chesman* v. *Nainby* (*a*), on a writ of error from the Common Pleas, and again in the same case, on a writ of error to the House of Lords (*b*). Again, it cannot be denied, that if this indenture had contained two covenants in point of form, the one relating to London and Westminster, and the other to a distance of 600 miles from them, the invalidity of the latter would in no way have affected the former. The question, therefore, seems to be one of construction; whether, from the language used, the covenant be capable of division. Now, if such language admits of its being construed divisibly in the condition of a bond, it is difficult to see why it is not equally capable of such construction, where it occurs in a covenant. No doubt the covenant formed the consideration for the payment of £1500, and possibly Gosnell would not have given so large a sum, unless the prohibition to trade had been as extensive as by the whole of the covenant it is made to be; but this is conjecture only, and, independent of the point that for a covenant under seal no consideration is necessary, it should be observed, that the restriction as to 600 miles from London and Westminster is only void, not illegal; and therefore, the rest of the restriction would have formed a sufficient consideration for the agreement to pay £1500.

Upon the whole, we are of opinion that this covenant is divisible, and that the judgment of the Court of Exchequer must be affirmed as to that point.

(*a*) 2 Str. 739; 2 Lord Raym. 1456.
(*b*) 1 Bro. P. C. 234.

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The other question arises upon the writ of inquiry executed before the Lord Chief Baron, to whose direction the jury a bill of exceptions was tendered. The first objection is, that on a writ of inquiry the Judge is but assessor to the sheriff, and that a bill of exceptions will not lie. The second is, that the jury should have been directed to find the actual damage sustained, and not the whole £5000. As we are of opinion that the direction of the Lord Chief Baron was right, we are not called upon to give any opinion on the first objection. The £5000 is expressly declared by the covenant to be "as and by way of liquidated damages, and not of penalty." It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The Courts have indeed held, that, in some cases, the words "liquidated damages" are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole intrument that the real intention was different. Here, however, there is but one thing to which the £5000 relates, viz. the restriction of trade, though extended to two different districts; and it is plain that the parties intended, that if the restriction was violated in either district, the sum should be paid, and not that inquiry should be made as to the actual damage and loss sustained. Upon this point, therefore, as well as the other, we are of opinion that the judgment must be affirmed.

Judgment affirmed.

1847.

Jan. 22.

MAY v. CHAPMAN and GURNEY.

To an action by indorsee, against A. and B. as drawers, of a bill of exchange, indorsed to C., and by him to the plaintiff, A. pleaded, that he and B. were in copartnership as brewers; that B. made and indorsed the bill, using the name of the firm, in fraud of A., and not for the purposes of the copartnership, but for his own private purposes, viz. for a private debt due from him to C., and without the knowledge or consent of A.; that there was no consideration or value to him, A., for the drawing or indorsement of the bill; of all which premises C., at the time of the indorsement to him, had knowledge and notice; and that at the time when the bill was indorsed and delivered to the plaintiff, he had full knowledge and

MPSIT.—The first count of the declaration was ill of exchange for 165*l.* 12*s.* dated the 16th July, rawn by the defendants, trading under the name, d firm of "John Gurney & Co.," upon William rs, payable to the order of the defendants four after date, indorsed by the defendants to C. P. l, and by him to the plaintiff. There was also a an account stated.

efendant Gurney pleaded only, to the first count of uration, that the defendants did not make the bill nge; and to the residue of the declaration, non t.

efendant Chapman pleaded, as to the first count eclaration—first, that the defendants did not make of exchange; secondly, that they did not indorse usfield; thirdly, that Bousfield did not indorse plaintiff; fourthly, that it was not duly presented thers for payment when due; and fifthly, that he idant had not due notice of its non-payment; and esidue of the declaration, non assumpsit. On all e pleas issues were joined. The defendant Chap- pleaded the following special pleas to the first

thly, that the bill was drawn and indorsed by the ts at the request of and for and by way of accom- of and for the said C. P. Bousfield, and without e or accommodation whatever for the making, in- or paying the same, and not otherwise; and that

the premises in the plea aforesaid.—Replication, that at the time when the bill l and delivered to the plaintiff, he had not any such knowledge or notice as in the ned; and issue thereon.

al, the jury found that C. had no knowledge of the original fraud in the drawing of that the plaintiff, at the time of the indorsement to him, had knowledge of that ld, that the plea was not proved.

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it was indorsed by Bousfield to the plaintiff without a consideration or value whatever having ever existed been given by him the plaintiff for such indorsem thereof.

Eighthly, that for a long time before and at the time making the said bill of exchange, to wit, for twelve mont the defendants were in copartnership in trade as brew under the name, style, or firm aforesaid, and during t time, for the purposes of such copartnership, and in car ing on the business thereof, made and indorsed divers b of exchange, using in that behalf the name, style, or f aforesaid; and that the defendant J. Gurney made and dorsed the said bill, using the name, &c. aforesaid, in fr of him the defendant Chapman, and not for the purpose the said copartnership, but for the private purposes of the said J. Gurney, to wit, for and on account of a pri debt of the said J. Gurney, before and at the time of said indorsement by him to the said C. P. Bousfield, and owing to him the said C. P. Bousfield, and not ot wise, and without the knowledge, consent, or authorit him the said S. Chapman; and that there never was consideration or value to him, Chapman, for the said di ing or indorsement of the said bill; of all which pren he the said C. P. Bousfield, at the time of the said ind ment to him as aforesaid, had full knowledge and no and that at the time when the said bill was so indorsed delivered to the plaintiff, as in the said first count m tioned, he the plaintiff had full knowledge and notice c the premises in this plea aforesaid.

The ninth plea was similar to the eighth, except instead of alleging notice to the plaintiff, it stated tha took the bill by indorsement from Bousfield, and he without value or consideration.

The tenth plea differed from the eighth, in stating the bill was indorsed to the plaintiff after it became du

Lastly, the defendant pleaded, that the indorsement o

bill to the plaintiff was obtained by fraud, covin, and wilful misrepresentation of the plaintiff, and others in collusion with him.

Replication to the 7th and last pleas, de injuriâ, and issue thereon. Replication to the 8th plea, that at the time when the bill was indorsed and delivered to the plaintiff, he, the plaintiff, had no knowledge or notice of *the premises in that plea mentioned:*—and to the 9th and 10th respectively, that Bousfield, at the time of the said indorsement to him, had not any such knowledge or notice as is in that plea mentioned or referred to. Issues thereon.

At the trial, before *Pollock*, C. B., at the sittings at Guildhall after last Trinity Term, it appeared that the bill in question, and a number of others, had been drawn by the defendant Gurney in fraud of the other defendant Chapman, with whom he had been in partnership since 1844, as brewers. These bills were discounted for Gurney by Bousfield, a bill broker, at 12½ per cent. It appeared also, that the plaintiff, who was an attorney, had been engaged with Gurney in other bill transactions, and that the bill in question was handed to him two days before it became due; and there was evidence of the plaintiff's knowledge that the bill was originally fraudulently drawn by Gurney, and indorsed by him to Bousfield. The Lord Chief Baron left it to the jury to say, first, whether Bousfield had notice of the fraud on Chapman; secondly, whether the plaintiff had notice of it. The jury found that Bousfield had no such notice, but that the plaintiff had notice of all the circumstances stated in the evidence. His Lordship thereupon directed a verdict to be entered for the plaintiff on all the issues, damages £171 7*s.*, reserving leave to the defendant Chapman to move to enter a verdict for him on the 8th issue, if the Court should think that plea was proved.—In last Michaelmas Term (Nov. 7),

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Watson moved pursuant to the leave reserved, and a
a rule to shew cause why the judgment should not be ar
as to the verdict on the 9th and 10th issues.—The repli
to the 8th plea, that *the plaintiff*, at the time of t
dorsement to him, had no notice of the premises i
plea mentioned, admits the notice to Bousfield, wh
stated in the plea, and which was a necessary ave
in order to make it a good plea. [*Alderson*, B.—Bo
was a bonâ fide holder, as was found by the jury.
then, could the plaintiff have notice of a non-existing
Pollock, C. B.—You say it could not be tried, on this
whether Bousfield was a bonâ fide holder or not.]
bill be concocted in fraud, indorsed in fraud, and in
over, the second indorsee, having notice of the o
fraud, must stand on the title of the first indorsee,
here is no title at all, even though he had given full
Carter v. *James* (*a*) is in point for the defendant.
admitted by the replication, for the purpose of this
that Bousfield was not a bonâ fide holder.

Secondly, the judgment ought to be arrested as to t
and 10th issues, for the part of those pleas which is n
in issue is a good answer to the declaration. [*Parke*
That will not entitle you to arrest the judgment; it
be ground for a repleader; but you cannot have
pleader, when you have several pleas under the sta
Anne. *Alderson*, B.—You have pleaded a plea v
multitude of averments, and you say the plaintiff has
issue on an immaterial one.] Yes; on that groun
that the defendant seeks to have the judgment ar
[*Pollock*, C. B.—If that be so, the defendant shoul
demurred. *Parke*, B.—The replication, however, p
issue a material allegation, namely, the notice to Bo
of the original fraud.]

The Court granted a rule on the first point, but r
it on the second.

(*a*) 13 M. & W. 137.

Martin (with whom was *Prentice*) now shewed cause.—The defendant was not entitled to the verdict on the 8th plea, without proving the last allegation, viz. that the plaintiff, at the time of the indorsement of the bill to him, had knowledge and notice, not only that the bill was originally drawn in fraud, but that Bousfield, at the time of its indorsement to him, knew and had notice of that fact. Now the jury have found that Bousfield was a bonâ fide holder for value, and that the plaintiff had notice only that the bill was drawn by Gurney in fraud of the defendant Chapman. [*Parke*, B.—Must not the plaintiff be shewn to have had knowledge of both frauds? My brother *Rolfe* thought, when the rule was granted, that the plea would be good, if it were confined to the allegation that the bill was indorsed to Bousfield by Gurney in fraud of his partners, and that the plaintiff had knowledge of that fraud.] There is no authority for that position. If a man gives value for a bill, without notice of its being drawn in fraud, he has a right to sue on it; and, for all that appeared in this case, the plaintiff may have believed Bousfield to be a bonâ fide holder, and that he was receiving the bill from one who had a good title to recover on it.—He was then stopped by the Court.

Watson and *Willes*, contrà.—A plea, that notice of the original fraud was given to the plaintiff, would be good, and every thing else contained in this plea is superfluous, and need not be proved. In *Gill* v. *Cubitt* (*a*), it was held that a broker who had taken a bill under circumstances of suspicion could not recover on it. [*Parke*, B.—That case must be considered as overruled.] Not so far as it applies to this case, in which the question is not one of *negligence*, but whether the plaintiff took the bill in good faith, without notice of its being made in fraud. In *Backhouse* v. *Harrison* (*b*), to an action by an indorsee against

(*a*) 2 B. & C. 466. (*b*) 5 B. & Ad. 1098.

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the indorser of a bill of exchange, who had lost the bill accident, it was held to be a good defence, that the plair took the bill fraudulently, or under such circumstar that he must have known that the person from whom took it had no title. This plea must be taken to be tr and if so, then Bousfield had no right to sue on the b It ought not to be taken that Bousfield had no notice the fraud. The plaintiff, therefore, cannot stand on Bo field's title: *Carter* v. *James* (*a*). The question is one bona fides.

POLLOCK, C. B.—I am of opinion that this rule ou to be discharged. I dissent from the doctrine which been contended for on behalf of the defendant, for wh no authority has been cited. It appears to me, that innocent party may transfer a title in the bill to a per who is no party to the original fraud, though he h knowledge of it. There is nothing to show that he r not purchase the bill, and has not a good title to rec upon it. It is said, however, that the defendant is enti to a verdict on the 8th plea, on the ground that the giv of the bill was a fraud on the partnership. [His Lord stated the plea and replication.] It turns out that there i distinct evidence that the plaintiff had notice that Bous took the bill fraudulently; on the contrary, the jury fo that Bousfield took it without knowledge of the fraud, that the plaintiff had notice "of all the circumstances sta in the evidence." There could not be notice to him that which did not exist. The plaintiff, therefore, entitled to recover on this issue, and the rule must discharged.

PARKE, B.—I am of the same opinion, that this r must be discharged. I am by no means satisfied that defence was available under any of the pleas, and think

(*a*) 13 M. & W. 137.

doctrine of the Court of Queen's Bench, in *Backhouse* v. *Harrison*, applies only to the case as between the original parties to the bill. Then we must take the facts to be, that Gurney made the bill in fraud of his partner, Chapman; that he discounted it with Bousfield, who had no knowledge of the fraud; and that the plaintiff took it by indorsement from Bousfield, he, the plaintiff, knowing at that time of the circumstances under which it had been originally made; and then the question is, whether the 8th plea was proved. [His Lordship stated that plea.] I agree that "notice and knowledge" means not merely express notice, but knowledge, or the means of knowledge to which the party wilfully shuts his eyes. But, upon the finding of the jury, it is clear that one of the notices mentioned in the plea is not found, viz. the notice of Bousfield's want of title. The whole that is alleged in the plea must be proved. I agree that the replication admits all the facts alleged in the plea, which are not traversed; it therefore admits the fact, that Bousfield's title was defective. But then the plea alleges also, that the plaintiff had notice of that fact; and it would have been a bad plea without that allegation, as not giving a sufficient answer to the primâ facie title of the plaintiff, arising out of the indorsement of the bill to him. Both the notices, therefore, alleged in the plea, were necessary to be proved in order to defeat the plaintiff's title, namely, the notice of the original fraud, and the notice of Bousfield's defect of title; and the latter not being proved, the plaintiff was entitled to recover on this issue.

PLATT, B.—I agree in opinion that this rule must be discharged. I think this plea would not have been well pleaded in any other manner. To have left out any of the allegations contained in it would have made it a bad plea. It states in substance, that the defendants were in partnership as brewers; that the defendant Gurney made and

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indorsed the bill, using the partnership name, in fraud his co-partner Chapman, for his own private purpo namely, on account of a private debt due from him Bousfield: that there was no consideration or value to hi Chapman, for the drawing or indorsing of the bill; th Bousfield had notice of these facts at the time of the i dorsement to him, and that the plaintiff, at the time of th indorsement to him, had full knowledge and notice of all th premises in the plea mentioned. Every one of these propositions was necessary to make the plea a good one. It was necessary to avoid the title of Bousfield, and also of the plaintiff, his indorsee: and the defendant did not do this, unless he shewed that the plaintiff had notice of the infirmity of Bousfield's title to the bill; otherwise the plaintiff took by all his title. The plaintiff, therefore, must not only know of the original fraud, but of Bousfield's knowledge of it, in order to preclude him from recovering on this issue. The plea would have been defective, if it had stated only notice to the plaintiff of the fraudulent concoction of the bill. The replication, therefore, put in issue both these notices, and one of them only was proved by the evidence.

Rule discharged.

Jan. 29.

LAWS and BELCHER, Assignees of BOTT, a Bankrupt, *v.* BOTT.

An action of debt was brought in the joint names of the official and trade assignees of a bankrupt, but without the knowledge or consent of the former, who, as soon as he was made acquainted with it, obtained a rule against his co-plaintiff, to stay the proceedings until he gave security for the costs. This rule was made absolute, and served on the defendant in the action. The cause had stood for trial at the sittings in the same term, but had been made a remanet to the sittings after the term, on the application of the defendant, on the ground of the absence of a material witness. At the latter sittings the record was withdrawn:—*Held*, that the defendant was entitled to move for judgment as in case of a nonsuit.

The Court will discharge a rule for judgment in case of a nonsuit, on a peremptory undertaking to try given by one of two plaintiffs, though the other protests against it.

THIS was an action of debt, brought in the names of the two plaintiffs, of whom Laws was the creditors' assignee;

and Belcher the official assignee, of the bankrupt, Bott, to recover a debt alleged to be due from the defendant to the bankrupt. The action had, however, been commenced and carried on by the plaintiff Laws without the knowledge or consent of the official assignee, who, as soon as he knew of its having been brought, applied for and obtained a rule calling upon his co-plaintiff to shew cause why the proceedings should not be stayed until he gave security for the costs. This rule was made absolute on the last day of last Michaelmas Term (*a*), and the rule absolute was served on the plaintiff Laws and on the defendant. The cause stood for trial at the sittings in Michaelmas Term, but was made a remanet to the sittings after that term, on the defendant's application, on the ground of the absence of a material witness, and without the condition of payment of the costs of the day. At the latter sittings the record was withdrawn.

In the early part of this term, *Hoggins*, for the defendant, obtained a rule nisi for judgment as in a case of a nonsuit.

Cleasby now shewed cause for the plaintiff Laws.—First, the defendant is not in a condition to make this application. When a town cause has been made a remanet from one sittings to another at the defendant's instance, he cannot afterwards move for judgment as in case of a nonsuit. Secondly, there has been no default on the part of the plaintiffs; for the not going to trial was in obedience to the rule of this Court, which stayed all the proceedings in the action. That rule was served on the defendant; and if he considered that it operated to his prejudice, he might have moved to set it aside.

Willes, for the plaintiff Belcher.—Where the plaintiff

(*a*) *Ante*, p. 300.

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has once taken the cause down to trial, but it becomes a remanet at the instance of the defendant, he cannot have judgment as in case of a nonsuit for a subsequent default; his course is to take down the cause for trial by proviso: 2 Chit. Arch. 1071 (7th Edit.). [*Pollock*, C. B.—It was held, in *Gadd* v. *Bennett* (*a*), that where a town cause was made a remanet from the sittings in term to the sittings after term, with the defendant's consent, he might still move for judgment as in case of a nonsuit. *Parke*, B.—In *Ham* v. *Greg* (*b*), the Court took a distinction between causes entered for trial in London and Middlesex, and causes entered for trial at the assizes. In the former, the record is not re-entered, nor any fresh notice of trial given, but the cause comes on as if the sittings had been continued without interruption; and therefore, where a cause is made a remanet from one sittings to another, and the plaintiff afterwards makes default, the defendant is entitled to move for judgment as in case of a nonsuit. That distinction was recognised by *Patteson*, J., in *Ladbroke* v. *Williams* (*c*).] Those are cases where the remanet is by the consent of both parties, but it is otherwise where the cause goes over at the instance of the defendant, without the plaintiff's concurrence: 2 Chit. Arch. 1072; *Jenkins* v. *Charity* (*d*). [*Parke*, B.—No such distinction is taken in *Ham* v. *Greg* or *Ladbroke* v. *Williams*. The question in this case really is, whether the plaintiffs, by quarrelling between themselves, can deprive the defendant of his right to have the cause proceeded with according to the practice of the Court.] But further, by the former rule pronounced in this case, the proceedings in the cause are stayed *until* the plaintiff Laws shall have given security for costs; and that is the usual form of such a rule, according to the practice of the

(*a*) 2 B. & Ald. 709.
(*b*) 6 B. & Cr. 125.
(*c*) 3 Dowl. & L. 368. See also *M'Intyre* v. *Somers*, 14 M. & W. 102.
(*d*) 2 Dowl. P. C. 197.

Court: 2 Chit. Arch., 996; *Spicer* v. *Todd* (*a*), *Whitehead* v. *Hughes* (*b*).

Hoggins, in support of the rule, was stopped by the Court.

POLLOCK, C. B.—This case involves two questions, one of which, however, as it appears to me, is disposed of by the authorities. On the point that this cause stood in the paper for trial in Michaelmas Term, and was made a remanet to the sittings after it, we are all of opinion that the defendant has, on the authorities, a right to apply for judgment as in case of a nonsuit, for the subsequent default. On the second point, the difficulty arises thus: One plaintiff has made an application against his co-plaintiff, to restrain him from going on with the cause until he gives security for the costs. Now I think it was the fault of the party applying, that he did not anticipate the defendant, by applying to stay the proceedings in the cause altogether and in every shape. He should, under all the circumstances, have made the defendant a party to the original rule, in which case the Court would be called on to decide the whole matter, with all the parties before them. It was therefore the fault of the assignee that the rule was drawn up in its present shape. We must, however, construe that rule reasonably; and it must be construed to mean that the plaintiff is not to go on *voluntarily*, i. e. he is not to take proceedings of his own; but not that the defendant, who was no party to the rule, is not to take proceedings. It is new to me that an application can be made by one plaintiff against his companion, which is to operate to the prejudice of the defendant, who is no party to it. The cases of *Spicer* v. *Todd* and *Whitehead* v. *Hughes*, which have been cited, do not bear out such a position.

(*a*) 2 C. & J. 165. (*b*) 2 C. & M. 318.

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This rule, therefore, must be made absolute, unless the plaintiff will give a peremptory undertaking to go to trial.

PARKE, B.—I am of the same opinion. The question as to the effect of the remanet has been clearly settled by the authorities. The other question now comes before the Court for the first time; and it appears to me, that, as the defendant was not a party to the rule to stay the proceedings, we must construe that rule without reference to his rights. The Court, by that rule, gave the plaintiff applying as much relief as they could, namely, that proceedings should be stayed until his co-plaintiff gave him security for his costs; and we must construe that as meaning, that that plaintiff should not take any voluntary proceedings until he had given the required security. Whether a more stringent order might be made is not the question before us. Where a plaintiff seeks relief against his co-plaintiff, by a rule on which the defendant is not brought before the Court, the only effect of the rule is to restrain all proceedings *by the plaintiff*. If they were in a condition to declare, they are still bound to declare, and the defendant may non pros. them for not declaring; and in like manner, if issue be joined, the defendant may at the proper time move for judgment as in case of a nonsuit. All, therefore, that the former rule in this case means, is, that the plaintiff shall not *voluntarily* go to trial; but as the defendant is not bound by that rule, it is open to him to insist on the cause going on according to the practice; and as a default has been made, he is entitled to judgment as in case of a nonsuit.

ALDERSON, B.—I am of the same opinion. The only reasonable construction that can be put on such a rule as this, which is between co-plaintiffs, and to which the defendant is no party, is by holding, that the one plaintiff thereby restrains the other from proceeding in the cause, *unless*

ced on by the defendant. Were this not so, any ons who sue a third, and find that the cause is not go on to their own satisfaction, would have the f getting out of it, by one of them applying against anion for a rule to stay proceedings.

r, B., concurred.

y thereupon offered a peremptory undertaking, although *Willes*, for the official assignee, refused party to it, and protested against any steps being e Court accepted; and the rule was thereupon d, on a peremptory undertaking by the plaintiff try at the sittings after this term.

EROD and Another *v.* CHADWICK and Another. *Jan.* 12.

PASS for seizing, taking, and selling certain goods tels of the plaintiff. Plea, not guilty, by statute. trial, before *Coleridge*, J., at the last Liverpool t appeared that this was an action brought to re- mages against the defendants, who were justices ace in and for the division of Middleton, in the f Lancaster, and who had issued four warrants aining on the goods of the plaintiffs, the occu- a mill in the township of Todmorden and

A warrant of distress for poor-rates need not in terms state that the refusal to pay the rate was proved *upon oath*; it is enough to state that it was *duly* proved.

The mis-recital, in a warrant of distress for poor-rates, of the *date* of the rate, is not material.

Vict. c. 45, it is a sufficient publication of a poor-rate if a copy of it be affixed, e service, on the Sunday next after its allowance, on the *principal or most usual* the churches and chapels of the Established Church within the parish, in which ce is performed. It is not necessary to publish it on *all* the doors of any church nor on the door of a church or chapel in which divine service has ceased to be nor on the door of any building, not being a church or chapel, in which divine erformed.

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Walsden, a united township maintaining its own poor, for the sum of £84, alleged to be due from them for poor-rates. It appeared that there was in that township an ancient chapel of the Established Church, which having fallen into decay, a new church was built, in the year 1832, under the powers of the Church Building Act, 3 Geo. 4, c. 72, to which the galleries and some other of the fittings were removed from the old chapel, the pews remaining. This church was duly consecrated in the same year, and divine service had ever since been regularly performed in it; but parish meetings continued to be held, and baptisms and burials to be occasionally performed, in the old chapel. Both the chapel and the new church have two outer doors. In the year 1840, a national school was established in Walsden, and divine service has since been performed in the school-room, on Sundays, by a clergyman of the established church. The rate in question was made on the 24th September, 1839, and allowed on the 25th November following. It was published by affixing notice thereof on the *principal door* of the new church, on the Sunday next after its allowance. No notice of it was put up on the other door of the church, or at the old chapel or the school-room. The warrants of distress were in the following form:—

"Division of Middleton, county of Lancaster;—To the churchwardens and overseers of the poor of the township of Todmorden and Walsden, in the said county, and to Wm. Greenwood and John Smith, the constables of the said township, and every of them: Whereas in and by a certain rate and assessment, dated the *25th day of November*, 1839, made, assessed, allowed, and published according to the statute in that case made and provided, Abraham Ormerod, William Ormerod, and Peter Ormerod, inhabitants and joint occupiers of certain buildings and tenements in the said township of Todmorden and Walsden, were duly rated and assessed for and towards the necessary

he poor of the township, for the year 1839, in f 41*l.* 7*s.* 6*d.*, and there is now in arrear and respect of the same the sum of 9*l.* 17*s.* 1*d.*; and duly appeareth unto us, the undersigned Wilwick and George Ashworth, Esquires, two of ty's justices of the peace in and for the said Lancaster, and acting in and for the said divi-iddleton, in the said county, as well upon the on oath of Joseph Knowles, one of the overseers of the said township of Todmorden and Wals-herwise, that the said sum of 9*l.* 17*s.* 1*d.* hath lly demanded by him of the said Abraham Or-illiam Ormerod, and Peter Ormerod, and that refused, and do refuse, to pay the same; and e said Abraham Ormerod, William Ormerod, Ormerod, have been duly summoned to appear the said justices, to shew cause why they have e said sum last assessed (being parcel of the said ich they were so rated and assessed as aforesaid), having appeared, by William Eastwood, their n this behalf, before us in pursuance of such and it hath been *duly proved* unto us the said the presence and hearing of the said attorney of braham Ormerod, William Ormerod, and Peter that an assessment for the relief of the poor of hip of Todmorden and Walsden, and for other hargeable therein, according to law, dated the f November, 1839, was duly made, allowed, and as aforesaid; and that the said Abraham Orme-m Ormerod, and Peter Ormerod, are therein and essed at the sum of 41*l.* 7*s.* 6*d.* as aforesaid, and m of 9*l.* 17*s.* 1*d.*, parcel of the said last-mentioned w in arrear and unpaid by the said Abraham William Ormerod, and Peter Ormerod. And hath now also been proved unto us, the said the presence and hearing of the said attorney

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of Abraham Ormerod, William Ormerod, and Peter Ormerod, that the said last-mentioned sum of 9*l.* 17*s.* 1*d.* hath been duly demanded of the said Abraham Ormerod, William Ormerod, and Peter Ormerod, but they have not paid, and have refused and still refuse to pay the same, and the said Abraham Ormerod, William Ormerod, and Peter Ormerod, have not, nor hath any of them, by their attorney as aforesaid, or otherwise, shewn unto us any sufficient cause for not paying the same: these are therefore, in her Majesty's name, to command and require you forthwith to make distress of the goods and chattels of the said Abraham Ormerod, William Ormerod, and Peter Ormerod, for the sum of 9*l.* 17*s.* 1*d.*, and if within the space of four days next after such distress by you taken, the last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale that you retain the said sum of 9*l.* 17*s.* 1*d.* and also the reasonable charges of taking, keeping, and selling the said distress, rendering to the said Abraham Ormerod, William Ormerod, and Peter Ormerod, the overplus (if any) upon demand; and if no such distress can be found, that then you certify the same unto us, to the end that such further proceedings may be had therein as to law doth appertain. Given under our hands and seals, at Rochdale, in the said county of Lancaster, the 28th day of March, A. D. 1845.

"WILLIAM CHADWICK, (L. S.)
"GEORGE ASHWORTH, (L. S.)"

The counsel for the plaintiffs contended that they were entitled to a verdict, on the following grounds:—First, that there had been no sufficient publication of the rates within the statute 1 Vict. c. 45, which required that the notice should have been affixed to all the doors of the chapel, church, and school-house; secondly, that the warrants were

d; 1, because they described the rate as made on a rong day; and 2, because the refusal of the plaintiffs pay the rate was not therein alleged to have been oved before the defendants *on oath*. The learned judge served these points for the consideration of the Court, d under his direction a verdict was found for the plaintiffs, damages £84, leave being reserved to the defendants move to enter a nonsuit, or a verdict for them.

In last Michaelmas term, *Martin* obtained a rule nisi cordingly; against which, in the same term (*Nov.* 12 d 13),

Baines and *Hall* shewed cause.—The first and main estion in this case is, what is to be deemed, since the Vict. c. 45, a sufficient publication of a poor-rate. Before at statute, oral publication during the performance of vine service was required by several statutes. The 17 eo. 2, c. 3, s. 1, enacts, that "the churchwardens and verseers, or other persons authorised to take care of the or, shall cause public notice to be given in the church every rate for the relief of the poor allowed by the stices, the next Sunday after such allowance; and no te shall be reputed sufficient, so as to collect the same, nless such notice shall have been given." By such a ode of publication every parishioner might have notice f the making of the rate. And if that direction were not omplied with, the rate became a mere nullity: *Rex* v. *Newcomb* (*a*), *Sibbald* v. *Roderick* (*b*). The new mode of ublication, directed by the statute of Victoria, is expressly tated to be in substitution of the former mode, and was ntended to insure at least as extensive a publicity. The words of section 2 are, that all proclamations and notices which under the former law were made or given in churches r chapels, during or after divine service, shall be reduced

(*a*) 4 T. R. 368. (*b*) 11 Ad. & E. 38.

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into writing, and copies thereof shall, "previously to the commencement of divine service, on the several days on which such proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near *the doors* of *all* the churches and chapels within such parish or place." Under this enactment, it is submitted that the notices ought in this case to have been put up on *all* the doors of the church, and also of the chapel and school-house. Such a construction appears to be favoured by the case of *Regina* v. *Whipp* (*a*). *Coleridge*, J., there observes, in the course of the argument, that the intention of the legislature was by this act to extend the publicity of the rates beyond the limits provided for by the former law. In the first place, the notice should have been affixed on *both* the outer doors of the new church, through both of which the congregation enter and leave the church at the time of divine service; otherwise some of the congregation will not have that information which under the former mode of publication in the church the whole of them had. [*Parke*, B.—The other side will say "the doors" in this section mean the *principal* doors.] That construction appears to be inconsistent with the object of the act, and also with the 3rd section, which requires in terms that notices of holding vestries, when signed as therein directed, shall be affixed "on or near to the *principal* door" of the church or chapel. But the words of sect. 2,—"the doors of all the churches and chapels,"—are properly and logically construed to mean *all* the doors. When you use the definite article and the plural noun, it includes all the individuals of the class mentioned. The stat. 31 Eliz. c. 3, expressly requires a proclamation of outlawry, immediately after divine service, at "*the most usual door*." The most usual door is not necessary the

(*a*) 4 Q. B. 141.

principal door; the legislature, therefore, here recognizes a distinction between the *principal* door and *the* door. [*Alderson*, B.—What is the distinction between the principal door and the most usual door? *Rolfe*, B.—Does the "principal" door mean principal in point of architecture or of user?] It means that which the architect would call the principal door; the architecture is permanent, the user varies. But all difficulty on this point is obviated by the construction which requires the notice to be affixed on *all* the doors. [*Parke*, B.—The reason of the language used in sect. 3 is, that that section applies only to the Vestry Act, where the "principal door" is spoken of.] The legislature meant that every inhabitant, resorting to his parish church, should have an opportunity of knowing that the rate was made.

The next question is, what were the "churches and chapels" upon which, in this case, the rate ought to have been published. Now there was evidence that the old chapel, though disused for the celebration of divine service, is still used for the performance of baptisms and burials, and for the holding of parochial meetings. As long as it is a chapel, and used as such, it is within the act of Parliament. Nothing that has been done has made it cease to be a chapel. The consecration of the new church certainly does not. The celebration of divine service may at any time be resumed in it. [*Rolfe*, B.—What do you call a "church or chapel?"] A building which has been consecrated according to the rites and ceremonies of the church of England. [*Alderson*, B.—Suppose it a church in ruins beside a new one?] That has ceased to be a church for all purposes. [*Rolfe*, B.—No, only for the purposes of divine worship.] This is the church in which, according to the evidence, the parishioners have, down to the present time, been wont to assemble for parochial purposes. Again, the school-house, though not licensed or consecrated, is brought within the act by the circumstance of divine service being

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performed there according to the rites of the church of England.

Thirdly, the allegation in the warrant, of the proof of the plaintiffs' refusal to pay the rates, is insufficient, not stating it to have been proved *on oath*, but only that it was "duly proved." This warrant operates as a *conviction*, not as a mere *order*, and ought to have all the certainty which is required in convictions: and a demand of payment and refusal to pay is clearly necessary to be proved, in order to justify the issuing of the warrant. That must of course be proved by examination upon oath, and it must be so stated in the warrant. And the statement that the fact was "*duly* proved" is not equivalent to this.—On this point they cited *Tracy* v. *Talbot* (*a*), *Rex* v. *Chandler* (*b*), *Ex parte Aldridge* (*c*), *Rex* v. *Croke* (*d*), *Ex parte Jones* (*e*), *In re Tordoff* (*f*), *In re Grey* (*g*), *Ex parte Fuller* (*h*), *Regina* v. *Wroth* (*i*), *Regina* v. *Lewis* (*k*), *Coster* v. *Wilson* (*l*).

The other objection to the warrant is, that the date of the rate is misdescribed in it. There is no such rate as that which is stated in it, namely, a rate made on the 25th *of November*, 1839. The date of the rate is a necessary part of it. The form given in the appendix to the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, is "An Assessment, &c. made this 30th day of March, in the year of our Lord," &c. The *date* of the rate is the time when it was *made*, not when it was *allowed:* allowance and publication are two other acts distinct from the making. The date, therefore, being material, and being part of a written instrument, ought to be truly stated. Such is the rule even in civil pleadings; it cannot be less stringent in a

(*a*) 2 Salk. 532.
(*b*) Lord Raym. 545.
(*c*) 2 B. & C. 600.
(*d*) Cowp. 26.
(*e*) 1 New Sess. Cases, 3.
(*f*) Id. 171.
(*g*) 2 Dowl. & L. 539.
(*h*) 1 New Sess. Ca. 234.
(*i*) 2 Dowl. & L. 729.
(*k*) 1 Dowl. & L. 822.
(*l*) 3 M. & W. 411.

warrant of distress. [*Parke*, B.—The question is, whether the rate is not sufficiently described, so that there could be no mistake about it. It is not a question of *variance*. Striking out all about the 25th of November, there is quite a sufficient description of the rate. It is a case of falsa demonstratio quæ non nocet. *Alderson*, B.—With respect to the question about the *doors*, I find that, according to a note of the reporter to the case of *Regina* v. *Marriott* (*a*), the question as to the necessity of fixing the notices on all the doors of the church was decided in that case. Notwithstanding this very objection, a mandamus issued to compel the justices to issue their warrant of distress. *Pollock*, C. B. —That authority disposes of that part of the case.]

Martin and *Addison*, in support of the rule.—In substance two points have been made on the other side; the first on the validity of the rate, the second on the form of the warrant. As to the rate, three defects are alleged; first, that it should have been published on all the doors of the church; secondly, that it should have been published on the old chapel; and thirdly, that it should have been published on the school-house. The first is disposed of by the case of *Regina* v. *Marriott*. With respect to the second, the words of the 1 Vict. c. 45, s. 2, "previously to the commencement of divine service," shew clearly the meaning of the legislature, with refence to its object. It is plain that the intention was the notice should be published at the same place at which divine service was ordinarily celebrated. In point of fact, there was in this case a complete substitution of the new church for the old chapel for all ordinary ecclesiastical purposes. But it is not necessary to enter into those facts, for it is clear that the true meaning of the statute of Victoria is, that the church on or near the door of which the notice is to be affixed is the church at which, during divine service, the notice was before read.

(*a*) 12 Ad. & Ell. 779.

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The difference of phraseology in the 2nd and 3rd sections is at once explained by their containing recitals of different statutes with different words. [*Parke*, B.—Surely the justices are to take things as they are de facto. Suppose the church had opened without being legally consecrated, is it therefore to be a bad publication of the rate?]

Secondly, as to the form of the warrant. There are no words in the stat. 43 Eliz. c. 2, s. 4, which expressly or impliedly require that all the evidence of the facts shall be given upon oath. Suppose the party came in and admitted them all—or the facts were on record—it could not then be necessary. It clearly is not necessary so to state, unless the statute on which the proceedings are founded requires it: *Basten* v. *Carew* (*a*). But, if it be necessary, it sufficiently appears here that the justices did act upon oath. The words of the warrant cannot be satisfied but by supposing that the fact was proved *in a legal manner;* that is, by oath, if an oath be necessary: *Rex* v. *Luffe* (*b*). [*Parke*, B.—If this is a *conviction*, all the evidence should be set out.] It is not a conviction, but a warrant of distress,—a mere *order*,—and the evidence is not set out in any form of such a warrant which has ever been given. It is not to be assumed that judicial officers will act contrary to law. *Ex parte Aldridge* was the case of a conviction on the 3 Geo. 4, c. 110, which expressly requires proof on oath: and the same observation applies to most, if not all, of the cases cited on the other side. With respect to the case of *Regina* v. *Wroth*, which was the decision of a single judge, that appears to be overruled by *Regina* v. *King's Lynn* (*c*). They cited also *Rex* v. *Fisherton Delamore* (*d*).

POLLOCK, C. B.—The last point is one of considerable importance, and the Court will take time to consider upon it.

Cur. adv. vult.

(*a*) 3 B. & C. 649.
(*b*) 8 East, 193.
(*c*) 15 Law J., N. S., M. C. 93.
(*d*) Sess. Ca. 45.

The judgment of the Court was now pronounced by

POLLOCK, C. B.—In this case, which was argued before my Brothers *Parke, Alderson, Rolfe,* and myself, during the last term, upon a rule to enter a verdict for the defendants, on points reserved by my Brother *Coleridge,* the facts necessary to be stated were these:—This was an action of trespass, brought against the churchwardens and overseers of the township of Todmorden, for seizing the plaintiffs' goods under four warrants of distress for poors' rates, all in the same form, and there is no occasion to notice more than one of them. The plaintiffs' case was, first, that the rate was invalid, and secondly, that the warrant was void. The objection to the rate was, that it was not duly published on the first Sunday after its allowance, and was therefore void. On that Sunday the written notice of the allowance was placed on the principal or most usual door of the church at Todmorden. There was another door, on which no notice was placed. There had also been, prior to the year 1832, a public chapel in a hamlet of the same township, which, on the consecration of the before-mentioned church in that year, ceased to have divine service performed in it. Its galleries were removed, but its pews were left behind, and occasionally burials took place in the churchyard, and christenings in the church, when convenient to the clergyman, and parochial meetings were held there, its situation being convenient for the inhabitants of the whole township; but, by order of the commissioners for building churches, the emoluments of the chapel were transferred to the incumbent of the new church about the time of its consecration. It appeared, also, that in the hamlet of Walsden (part of the township) there was a school-house, in which service was celebrated on Sundays by a regular minister of the church of England, and that there were some chapels of dissenters from the church of England, duly licensed, in the township. The notice of the allowance of the rate was not placed on

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any of the doors of either the old chapel, or of the school-house, or of any dissenters' chapel. Under these circumstances, it was contended that the notice was not given in conformity with the provisions of 1 Vict. c. 45, which substitutes a written notice for the publication of the rate required by 17 Geo. 2, c. 3, for two reasons; first, because it was not fixed to *all* the doors of the new church; secondly, because it was not fixed on any door of the old chapel or school-house. It was not urged, nor could it be with success, that the notice ought to have been posted on the doors of dissenters' chapels.

We are all of opinion that the objection to the notice ought not to prevail.

The statute 1 Vict. c. 45, was passed for the purpose of preventing the interruption of divine worship by notices of a secular character, and giving an equivalent in the shape of a written advertisement on the fabric of the church, where it would be likely to be observed.

The 1st section thereof enacts, "that so much of the 58 Geo. 3, c. 69, as directs the publication of such notices to be made in the parish church or chapel on some Sunday during or immediately after divine service, shall be and the same is hereby repealed; and that from and after the 1st of January next, no proclamation or other public notice for a vestry meeting, or any other matter, shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel at the conclusion of divine service." Section 2 enacts, "that all proclamations or notices, which under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels, during or after divine service, shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall, previously to the commencement of divine service on the several days on which such proclamations of notices have heretofore been made or given in the church

given as aforesaid, and shall be good, valid, and
all intents and purposes whatsoever." Section
that no such notice of holding a vestry shall be
the principal door of such church or chapel,
same shall previously have been signed by a
den of the church or chapel, or by the rector,
urate of such parish, or by an overseer of the
ch parish, but that every such notice so signed
fixed on or near to the principal door of such
chapel."

question arises on the construction of the 2nd
he 1 Vict. c. 45; whether the word "doors" is to be
aning *all* the churches and chapels, or only *the door*
urch *and the door* of every chapel, referendo sin-
lis, the word "door" being used in the sense of the
door. Each construction is equally consistent
rords of the sentence, but we think that the lat-
to prevail. If the legislature had meant that
should be done at more doors than *one* (no pre-
te having required anything to be done at more
oor) they would have so expressly provided, by
word "*all*;" and the context appears to us to
construction. The publication of a notice of
uired by the 58 Geo. 3, c. 69, during divine
repealed. The written notice on the *principal*

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proclamation of outlawry, immediately after divine service, "*at the most usual door.*" The recital of this statute mentions the word "door" only, evidently using it as synonymous with "*the most usual door;*" and the first section enacts, that no proclamation shall be made at the *door* (using the word in the same sense); and then section 2 provides, that on the days on which proclamations and notices have been heretofore given in the church, or at the *door* of any church or chapel, such proclamations and notices shall be reduced into writing, and affixed at or near to *the doors* of all the churches and chapels within such parish or place; and the word "door," in both members of the section, must have the same meaning, and as in the former it clearly means the most usual or principal door, so it must be in the latter. We therefore think that all that was intended was, that a notice should be placed on the most usual door only of each church or chapel. Therefore the effect of the statute is to substitute, for public verbal notice in the parish church, a public written, and therefore more permanent notice, on the chief entrances into each of all the parochial chapels and chapels of ease in the same district. Whether it extend to proprietary chapels, or any private chapels, is not necessary to be determined; most probably not.

The next question is, whether any notice was necessary to be placed on the principal door of the *old chapel.* Whether this chapel had *legally* ceased to be such or not, so as to be incapable of being again used for the purposes of divine service without a fresh consecration, need not be decided. It had ceased to be so de facto for twelve years; divine service had not been celebrated there for that time, and consequently it was no longer a church within the meaning of the act, as no notice could be placed on its principal door before the commencement of that service, as required by the second section. It is clear that notice was not required

to be placed on the door of the school-house, as that was ertainly not a church or chapel. We conclude, therefore, hat the rate was valid.

It remains to consider the validity of the warrant itself. was in this form [his Lordship read it]. One objection the warrant was disposed of during the argument by the ourt. It was said that it misrecited the date of the rate, hich was made by the churchwardens and overseers on the th September, 1839, and allowed on the 25th November. upposing this to be a mis-recital, the rate is quite sufficitly ascertained without the date, and the maxim falsa deonstratio non nocet applies. The other and more weighty jection to the warrant is, that it does not state that the idence against the plaintiff *was given on oath.* The warnt is in a form fuller than that given in Burn's Justice, dit. 1831, by Chitty, and which latter form is probably that nerally adopted and acted upon; and though we must ld it to be bad, if we were satisfied by the authorities at it is so, we ought not lightly to overturn a long estaished form: *Regina* v. *Rotherham* (*a*). Whenever the rticular statute requires the evidence to be upon oath, ich express enactment no doubt must be obeyed; and here a statute gives authority to magistrates to hear and etermine, or to convict, on the examination of witnesses, it implied "that the examination is to be taken as the law ills, *on oath;*" Dalton, ch. 6, s. 6, Paley on Convictions, 42; nd authorities were cited to shew that in convictions the vidence must be stated upon oath: *Ex parte Aldridge;* there, in truth, the conviction did not pursue the statutory orm given by 3 Geo. 4, c. 110, and was therefore clearly ad); and also that in orders of commitment, not founded n a previous conviction, which were said to be themselves convictions," the same statement was requisite: *Ex parte mes,* coram *Williams,* J., (there called a conviction, under

(*a*) 2 Q. B. 557.

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4 Geo. 4, c. 34, s. 3.): *In re Grey*, on the same statute, coram *Patteson*, J.; *Regina* v. *Lewis*, coram *Williams*, J., on the same act. *In re Tordoff* was a decision on a similar commitment, on a conviction upon the same statute, by the full Court, but on a different point. On the other hand, in orders (not being convictions), the same strictness has not been held necessary. In a very early case, *Rex* v. *Fisherton Delamore*, an order, "upon due consideration," was held to be well, for it implied a "due examination," which was clearly admitted to be good. So, in *Rex* v. *Luffe*, where an order of filiation, stating that it was made on oath of *the wife* and *otherwise*, was held good. So, in the case of *Regina* v. *King's Lynn*, my brother *Coleridge*, in the Bail Court, held an order of removal good, notwithstanding a similar objection. There is, it is true, a contrary decision by my brother *Wightman*, *Regina* v. *The Justices of Buckinghamshire*, as to an order of filiation; but *Rex* v. *Luffe* was not cited, and *Coleridge*, J., is reported to have said, in *Regina* v. *King's Lynn* (*a*), that if that case had been brought before my brother *Wightman*, he would not have decided against it. The result, therefore, of the cases appears to be, that in orders, properly so called, no statement need be made that the evidence was on oath, but in convictions, and commitments which incorporate convictions, and are treated as such, it must be so stated. Whether it might not have been as well held that less strictness than this should be necessary in convictions, and that it should be sufficient to state that the evidence was given in due manner, which would include evidence on oath, or affirmation, or by records, or by any other instrument of evidence, we need not now inquire. The point for us to decide is, whether it is necessary in a warrant of distress for a poor-rate. The granting such warrant is a judicial matter; the magistrate has to decide, as judge, whether it ought to be issued or not; *Harper* v.

(*a*) 15 Law J. Rep., N. S., M. C. 93.

rr (a); though his jurisdiction to decide that question pends upon two conditions; first, that there is a valid e; second, that the party being rated be an occupier in district. But the statute 43 Eliz. c. 2, does not re-ire, expressly or impliedly, that any formal record of viction should be drawn up, nor is any such prepared in ctice, nor does the warrant on the face of it appear to be ant to be a conviction, as in some of the cases referred and therefore we do not think that the decisions apply it. It ought, however, to appear upon it by express tement or reasonable intendment, that the authority, ich is out of the course of common law, has been pur-d; so, indeed, it must appear upon any order made in suance of a statute; so on a warrant of commitment, being in the nature of a conviction, it must appear her on the face of it, or by an order to which it refers: ster v. *Wilson* (b). It is admitted by the learned counsel the plaintiffs, that there is no case in which a warrant of tress has been held bad on such an objection; and not ing, therefore, bound by authority, and thinking that the ne strictness ought not to prevail as in convictions, and at the authority of the magistrate and the due form of oceeding do sufficiently appear on the warrant, we think at it was good, and that the defendants are entitled to a erdict.

The rule, therefore, must be made absolute.

Rule absolute.

(a) 7 T. R. 270. (b) 3 M. & W. 411.

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By 7 & 8 G. 4, c. 53, s. 82, the officer of excise proceeding by information for any offence against that act, as well as any party aggrieved by the decision of justices adjudging on such an information, may appeal to the quarter sessions, on giving the notices of appeal pointed out by the act. By s. 84, the quarter sessions are to re-hear upon oath, and to re-examine the same witnesses, and to reconsider the same evidence and the merits of the case, wherever the original judgment appealed against shall have been given, and shall not examine any evidence, or any witness or witnesses, other than or different from the evidence of the witness or witnesses which and who shall have been examined before the justices at the hearing of the information on which the original judgment shall have been given, and may reverse or confirm in whole or in part the judgment appealed against, or give such new or different judgment as in their discretion they think fit.

ON appeal against a conviction by three of her Majesty's justices of the peace for the borough of Leeds, in the county of York, which came on to be tried at the quarter sessions of the peace for the said borough, held on the 31st December, 1845, before T. F. Ellis, Esq., recorder of the said borough; the said recorder quashed the said conviction, and reversed the judgment of the said justices on the fourth count of the information in the said conviction set forth, subject to the opinion and direction of the Court of Exchequer on the following case:—

On the 26th September, 1845, J. Bedford, one of her Majesty's officers of excise, exhibited an information against S. G. Gamble, before a justice of peace for the said borough of Leeds, in the county of York, a copy of which information is set forth, according to the tenor thereof, in the schedule hereunto annexed, and is therein marked with the

An information on this act contained four counts. The justices convicted on the fourth, and acquitted on the others. The defendant gave notice of appeal from the judgment to the quarter sessions, but the officer prosecuting on the part of the Crown gave no notice of appeal against the judgment of acquittal on the first three counts:—*Held*, that the defendant's notice of appeal was limited to the judgment of the convicting justices on the fourth count, and that if, on the hearing, the court of appeal was of opinion that that count was not sustained by the evidence adduced, but that the second count was, the judgment must be altogether for the defendant.

It appeared on affidavit, that the court of appeal, constituted by 7 & 8 Geo. 4, c. 53, s. 82, suspended its judgment, and stated a special case for the opinion of the Court of Exchequer, under s. 84:—*Held*, that no certiorari was requisite to enable that court to give its direction on the special case.

The original distinction of grand and petty larceny made it necessary in indictments for larceny to allege the value of the chattel stolen, in order to allot the punishment; but whether, in an information for offering a country bank-note to an excise officer, by way of bribe, the value of it need be stated, *quære*.

A.] (a). On the 13th October, 1845, three justices
peace for the said borough convicted the said S.
ble of the offence charged on him by the fourth
the said information, and did adjudge that the
G. Gamble had forfeited for his said offence the
£500, which the said last-mentioned justices did
igate to the sum of £152; and the said last-
d justices did then adjudge that the said S. G.
was not guilty of the several offences charged
in and by the first, second, and third counts of
information, and did then acquit him thereof ac-
; the record of which said judgment and con-
as amended by the said court of quarter sessions,
er hereinafter set forth, is contained in the schedule
annexed, and is therein marked with the letter

d immediately upon the giving of the said judgment,
S. G. Gamble gave notice, in writing, of appeal
said judgment to the general quarter sessions of
e for the said borough next after the expiration
y days from the giving of such judgment, which
ce is set forth, according to the tenor thereof, in
dule hereunto annexed, and is therein marked with
r [C.] (c).

e trial of the appeal, it was proved that the said
ion was exhibited on the 26th September, 1845,
hin four calendar months next after the acts of
relied on by the respondent as proving the several
charged in and by the said information were com-
The counsel for the appellant thereupon objected

his information appears
ord of the conviction.
is record follows the

wo notices of appeal
en; one to the clerk of the peace, the other to the informant Bedford, under 7 & 8 G. 4, c. 53, ss. 82, 83, and 4 Vict. c. 20, s. 30; but they need not be here stated.

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that the conviction was bad upon the face thereof, for not shewing with sufficient certainty that the information on which such conviction was founded was exhibited within four calendar months next after the offences charged therein had been committed (*a*). The recorder overruled the objection (*b*), but nevertheless, at the request of the counsel for the respondent, amended the said conviction in that behalf (*c*). Before such amendment was made, the said conviction, so far as the same is material to the present question, was as follows, that is to say:—"Be it remembered, that on the 26th day of September, A. D. 1845, and within four calendar months *after* each of the several offences hereinafter charged had been, and were alleged to have been committed respectively, one Joseph Bedford, of Leeds, in the borough of Leeds, in the county of York, being one of her majesty's officers of excise, personally came, at Leeds, in the borough of Leeds, in the county of York, before W. Pawson, Esq., one of her majesty's justices of the peace for the said borough of Leeds, wherein the offences hereinafter charged were committed, and as well for her said majesty as for himself, exhibited a certain information, which same information was then and there exhibited by order of the commissioners of excise, and thereby informed the said justices," &c. And after such amendment was made, the said conviction, so far as the same is material to the present question, was as follows, that is to say:—"Be it remembered, that on the 26th day of September, A.D. 1845, and within four calendar months *next after* (*d*) each of the several offences, charged in the information hereinafter mentioned, had been committed, and were

(*a*) 4 & 5 W. 4, c. 51, s. 19.

(*b*) *Harding* v. *Stokes*, 2 M. & W. 233; Tyr. & Gr. 599, acc. See also 11 M. & W. 277; *R.* v. *Brown*, M. & M. 163. Also per *Parker*, C. J., *R.* v. *Rawlinson*, Gilbert's Cases in Law and Equity, 242.

(*c*) See 7 & 8 G. 4, c. 53, s. 73, 83.

(*d*) See Paley on Convictions, by Deacon, 31; 4 & 5 W. 4, c. 51, s. 19; 7 & 8 G. 4, c. 53, ss. 82, 83; 5 & 6 W. 4, c. 76, s. 105.

etter [A.] (a). On the 13th October, 1845, three justices of the peace for the said borough convicted the said S. G. Gamble of the offence charged on him by the fourth ount of the said information, and did adjudge that the aid S. G. Gamble had forfeited for his said offence the um of £500, which the said last-mentioned justices did hen mitigate to the sum of £152; and the said last-entioned justices did then adjudge that the said S. G. Gamble was not guilty of the several offences charged pon him in and by the first, second, and third counts of he said information, and did then acquit him thereof accordingly; the record of which said judgment and conviction, as amended by the said court of quarter sessions, n manner hereinafter set forth, is contained in the schedule ereunto annexed, and is therein marked with the letter B.] (b).

At and immediately upon the giving of the said judgment, he said S. G. Gamble gave notice, in writing, of appeal rom the said judgment to the general quarter sessions of he peace for the said borough next after the expiration f twenty days from the giving of such judgment, which aid notice is set forth, according to the tenor thereof, in he schedule hereunto annexed, and is therein marked with he letter [C.] (c).

On the trial of the appeal, it was proved that the said information was exhibited on the 26th September, 1845, and within four calendar months next after the acts of bribery relied on by the respondent as proving the several offences charged in and by the said information were committed. The counsel for the appellant thereupon objected

(a) This information appears in the record of the conviction.

(b) This record follows the case.

(c) Two notices of appeal were given; one to the clerk of the peace, the other to the informant Bedford, under 7 & 8 G. 4, c. 53, ss. 82, 83, and 4 Vict. c. 20, s. 30; but they need not be here stated.

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the said appellant was not guilty of the offences charged and by the first, third, and fourth counts of the said info mation respectively; but such finding of the said record was conditional only, and was not to be of any force validity, unless the said Court of Exchequer should be opinion that he ought to have given judgment upon t second count of the said information. The appellan counsel contended, that if any use were to be made of t said second count of the said information, such count w bad and insufficient, inasmuch as the promissory not therein mentioned were not nor were either of them there alleged to have been unsatisfied at the time when th were offered to J. C. Godfrey, as in the said second cou of the said information mentioned. The recorder overrul the objection, subject to the opinion and direction of t Court of Exchequer in that behalf.

The points for the opinion and direction of the Court Exchequer are as follows, that is to say:—

First, if the said Court of Exchequer shall be of opini that the said recorder had not power to amend the said co viction in manner hereinbefore mentioned, and that, wit out such amendment, the said conviction was insufficient law, in respect of all or any of the objections to the sa in that behalf taken by the counsel for the appellant hereinbefore mentioned, then the order of sessions is stand confirmed, and the conviction to be quashed.

Secondly, if the said Court of Exchequer shall be opinion that the said recorder was entitled to give jud ment of conviction upon the second count of the said i formation, then the order of sessions, so far as the sa relates to the finding and judgment of the said recorder, the matters aforesaid, is to stand and be as follows, that to say:—"Therefore, it manifestly appearing to the s court here, that the said S. G. Gamble is guilty of t offence charged upon him in and by the said second cou of the said information, the said court here doth conv

him of the said offence, in and by the said second count of the said information charged upon him, and the said Court here doth declare and adjudge that he, the said S. G. Gamble, hath forfeited and lost for his said offence, in the said second count of the said information charged upon him, the sum of £500 of lawful money of Great Britain: And the said Court here, by virtue of the statute in that case made and provided, doth mitigate and lessen the said sum of £500, so forfeited and lost by the said S. G. Gamble, to the sum of £152 of lawful &c., the said £152, after deduction therefrom of all costs and expenses relating thereto incurred, to be distributed and paid according to the form of the statute in that case made and provided (*a*). And the said Court here doth declare and adjudge that the said S. G. Gamble is not guilty of the said several offences charged upon him, in and by the first, third, and fourth counts of the said information, and the said Court here doth acquit him, the said S. G. Gamble, thereof, accordingly.

(Signed) "T. F. ELLIS,
Recorder of the Borough of Leeds."

The case was intitled, "In the Queen's Remembrancer's Office;" and, with the information, record of conviction and notices of appeal, &c. &c., referred to in it, was verified by an affidavit of the clerk of the peace of the borough of Leeds, intitled "*The Queen* v. *Gamble*."

The copy record of conviction (B.) in the case was as follows:—

Borough of Leeds, in the County of York, to wit. } Be it remembered, that on the 26th day of September, in the year of our Lord, 1845, and within four calendar months next after each of the several offences charged in the information thereinafter mentioned had been committed, and were

(*a*) 7 & 8 Geo. 4, c. 53, s. 78.

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therein alleged to have been committed, respectively, one Joseph Bedford, of Leeds, in the borough of Leeds, in the county of York, being one of her Majesty's officers of excise, personally came at Leeds, in the borough of Leeds, in the county of York, before William Pawson, Esq., one of her Majesty's justices of the peace for the said borough of Leeds, wherein the offences hereinafter charged were committed, and as well for her said Majesty as for himself, then and there exhibited a certain information, which same information was then and there exhibited by order of the commissioners of excise, and thereby then and there informed the said justice, that before and at the time of the committing the several offences thereinafter mentioned, one Samuel Gaunt Gamble was a maltster and maker of malt, and that the said S. G. Gamble, after the 5th day of January, 1828, and within four calendar months of the time of the exhibiting the said information last past, to wit, on the 27th day of May last past, to wit, at Kirkstall, in the borough of Leeds aforesaid, did give (*a*) to a certain officer of excise, to wit,

(*a*) By 7 & 8 Geo. 4, c. 53, s. 12, if any person shall directly or indirectly give or offer, or promise to give to such commissioner or assistant commissioner of excise, or commissioner of appeal, or officer or person so employed as aforesaid, any sum of money or other recompense or reward whatsoever, or shall propose, make, or enter into any collusive agreement with such commissioner, &c., or such officer or person so employed as aforesaid, to do or to conceal, or to connive at any act or thing, whereby any of the provisions of this act, or any other act or acts of Parliament, relating to the revenue of excise, shall or may be evaded or broken, or the said revenue defrauded, or to do or perform, or to permit or suffer to be done or performed, any act or thing contrary to the duty of such commissioner &c., or such officer or person so employed as aforesaid, or to neglect or forbear, or omit to do or perform any act or thing, belonging or appertaining to the duty of such commissioner &c., or such officer or person so employed as aforesaid; every person so offending shall, for every such offence, (whether such sum of money or other recompense or reward, or promise or security for the same, or such agreement, be received, accepted, entered into, acquiesced in, or performed or not), forfeit and lose the sum of £500.

mas Charles Godfrey, he the said T. C. Godfrey, l there being an officer of excise, divers, to wit, two s for sums of money, amounting together to the £20 of lawful money of Great Britain, that is to promissory notes, each of them for the payment of order to corrupt and prevail upon the said T. C. , so being such officer of excise as aforesaid, to ne- l forbear, and omit to do and perform a certain act g belonging and appertaining to the duty of the C. Godfrey, as such officer of excise as aforesaid, o say, to neglect and forbear, and omit, to report commissioners of excise, that he, the said T. C. , so being such officer of excise as aforesaid, and mas Tucker, being also an officer of excise, had on day, to wit, on the 24th day of May last past, at a place, to wit, at R., in the West Riding of the f York, detected and discovered in a certain couch n a certain place, to wit, a malt-house, of him the r. Gamble, then and there, to wit, on the day and l at the place last aforesaid, used as such maltster er of malt as aforesaid, a certain large quantity, to bushels of corn, then and there making into malt, close, and compact, as it could not have been unless had by some means or other been forced together contrary to the form of the statute in that case d provided; the reporting of such detection and y to the said commissioners of excise being then e an act belonging and appertaining to the duty of T. C. Godfrey, as such officer of excise as afore- trary to the form of the statute in that case made ided (*a*); whereby and by force of the statutes in made and provided, the said S. G. Gamble, so g as aforesaid, had, for his said offence, forfeited and

(*a*) See *Harding* v. *Stokes*, T. & Gr. 599.

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lost the sum of £500: And the said J. Bedford, who prosecuted as aforesaid, by the said information, exhibited as aforesaid, further informed the said justice, that the said S. G. Gamble, after the said 5th day of January, 1828, and within four calendar months of the time of exhibiting the said information last past, to wit, on the said 27th day of May last past, to wit, at K. aforesaid, in the borough of Leeds aforesaid, did offer to give to a certain officer of excise, to wit, to the said T. C. Godfrey, then and there being an officer of excise, divers, to wit, two securities for sums of money, amounting together to the sum of £20 of lawful money of Great Britain, that is to say, two promissory notes, each of them for the payment of £10, (as in the first count, from this place to the end).

The third count charged, that the defendant did give to a certain officer of excise, to wit, to the said T. C. Godfrey, he the said T. C. Godfrey then and there being an officer of excise, a certain recompense and reward, that is to say, divers, to wit, two bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £20 of lawful money, and of the value of £20 of like lawful money, in order to corrupt and prevail upon the said T. C. Godfrey, so being such officer of excise as aforesaid, to do and perform a certain act and thing, contrary to the duty of him the said T. C. Godfrey, as such officer of excise as aforesaid, that is to say, to make a false and untrue report to the commissioners of excise, touching and concerning the discovery and detection by him, the said T. C. Godfrey, so being such officer of excise as aforesaid, and one T. Tucker, being also an officer of excise, of a certain offence against the laws relating to her Majesty's revenue of excise, before then, to wit, on the 24th day of May last past, committed by the said S. G. Gamble, such offence, so by them the said T. C. Godfrey and T. Tucker discovered and de-

ted as last aforesaid, being, that he said S. G. Gamble, being such maltster and maker of malt as aforesaid, did, wit, on the day and year last aforesaid, at a certain e, to wit, at R., in the parish of C., in the West Riding he county of York, tread and force together in a certain ch frame, in a certain malt-house of him the said S. G. nble, by him the said S. G. Gamble, then and there, to , on the day and year and at the place last aforesaid, l as such maltster and maker of malt as aforesaid, a cer- other large quantity, to wit, other 130 bushels of corn, and there making into malt, contrary to the form of the ute in that case made and provided; the truly and cor- ly reporting such detection and discovery to the said missioners of excise being then an act belonging and ertaining to the duty of him the said T. C. Godfrey, uch officer of excise as aforesaid, contrary to the form the statute in that case made and provided; whereby l by force of the statute in that case made and provided, said S. G. Gamble, so offending as last aforesaid, had, his said last mentioned offence, forfeited and lost the ther sum of £500.

The fourth count charged, that the defendant did offer to e to a certain officer of excise, to wit, to the said T. C. dfrey, then and there being an officer of excise, a certain ompense and reward, that is to say, divers, to wit, two nk notes for the payment of divers sums of money, amount- g in the whole to a certain sum of money, to wit, the sum £20 of lawful money, and of the value of £20 of like wful money, (as in third count to the end).

The summons of the defendant to appear and plead and ttend the hearing of the information was then set out, with llegation of its service on the defendant, and of his appear- nce before the magistrates (named) at the day and place xed in the summons. The conviction then proceeded thus: -And the said S. G. Gamble having heard the charge con-

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tained in the said information, declared he was not of the said several offences, or of either of them: \ upon we the said justices did proceed to examii the truth of the charges contained in the said infor and on the said 13th day of October, in the yea said, at the court-house aforesaid, in Leeds aforesaid said borough of Leeds, two credible witnesses, to v said T. C. Godfrey of K. aforesaid, in the borc Leeds aforesaid, supervisor and officer of excise, a said T. Tucker of P., in the west riding of the co York aforesaid, officer of excise, upon the several spective oaths to them now duly administered sworn before us the said last-mentioned justices, in t sence of the said S. G. Gamble and of the said J. E severally and respectively depose and say of and con the premises charged in the said information, and in the presence of the said S. G. Gamble as of t J. Bedford, as follows, that is to say—[here was the evidence of the above witnesses in chief and c examination, with fac similes of the bank note the said S. G. Gamble being called upon by us t justices for his defence in the premises, does not to us the said justices any evidence, nor make a ficient defence to the said charge contained and upon him in and by the fourth count of the said i tion; therefore it manifestly appearing to us the sa mentioned justices, that the said S. G. Gamble is g the offence charged upon him in and by the said count of the said infomation, we do hereby convict the said offence in and by the said fourth count of information charged upon him, and we do hereby and adjudge that he the said S. G. Gamble hath f and lost for his said offence, in the said fourth count said information charged upon him, the sum of £ lawful money of Great Britain; and we the said j

of the statute in that case made and provided, do and lessen the said sum of £500, so forfeited and ie said S. G. Gamble, to the sum of £152, &c., ng as in the information, in p. 389]. Given under s and seals," &c. The paper-book also contained s of appeal above mentioned (*a*).

gham's rising to bring on this case on motion, for the appellant, objected that no hearing could e, for want of a certiorari to remove the case Court, citing 7 & 8 Geo. 4, c. 53, s. 79 (*b*) and

3 Geo. 4, c. 58, and a act, the duty on malt . 9*d.* per bushel.

8 Geo. 4, c. 52, s. 33, or grain making into be found in any cis- uch frame, so hard, compact, as it could been unless the same ome means or other en or forced together ery maltster or maker whose cistern or couch corn or grain shall be hard, close, and com- oresaid, shall forfeit

. Vict. c. 49, s. 5, any excise suspecting that ain making into malt tern or couch frame rodden &c. together, the maltster to throw rn &c., from the cis- uch frame, and such return the same into or couch frame, and l again in the same, increase shall be found e or quantity of such corn &c., after being so returned and laid level, above the former gauge, in a greater proportion [inter alia], than those of five bushels in every 100 bushels, previously to such corn &c., having been entered eight hours from the cistern, the increase so found shall be deemed conclusive evidence of such corn &c., having been trodden or forced together; and the court before whom such evidence shall be given, shall thereupon convict the maltster or maker of malt in the penalty imposed by 7 & 8 Geo. 4, c. 54, s. 33.

(*b*) By 7 & 8 Geo. 4, c. 53, s. 79, no writ of certiorari, or other writ or process, shall be issued at the suit of any *defendant* out of any of his Majesty's courts of record in England, Scotland, or Ireland, to supersede, resist, stay, remove, or in anywise affect any information or judicial proceeding before the commissioners of excise, or before any justice or justices of the peace in the United Kingdom,

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s. 84 (*a*). Ex abundanti cautelâ, the crown's u right to remove by certiorari is, notwithstanding, reserved to it by sect. 79, which takes it from the d [*Pollock*, C. B.—The legislature never means to

in pursuance of this act, or any other act or acts of Parliament relating to the revenue of excise, or any judgment thereupon, and that every such judicial proceeding shall be had and completed, and every such judgment executed, any such writ of certiorari, &c. notwithstanding; Provided always, that nothing herein contained shall extend or be construed to extend to any writ of certiorari sued or issued in such cases in behalf of his majesty out of his majesty's courts of Exchequer in England, Scotland, or Ireland, respectively.

(*a*) By 7 & 8 Geo. 4, c. 53, s. 84, upon every such appeal, the justices of the peace at the general quarter sessions, before whom respectively any such appeal shall be brought, are "required to proceed to re-hear upon oath, and to re-examine the same witness and witnesses, and to re-consider the same evidence and the merits of the case whereon the original judgment appealed against shall have been given, and they shall not examine any evidence or any witness or witnesses other than or different from the evidence of the witness or witnesses which and who shall have been before examined [or tendered for examination, and refused to be examined by the justices, 4 & 5 W. 4, c. 51, s. 24] before the commissioners of exci tices of the peace resp the trial and hearing formation upon whic ginal judgment shall given, and such com of appeal, and justic peace at the general q sions, are hereby r authorized and empo any such appeal, to confirm, in the whole the judgment appeal or to give such new o judgment as they in cretion shall in that be fit, and such commi appeal and justices of at the general quarter spectively shall, in an or different judgment, same power of mitig hereinbefore by this a justices of the peace missioners of excise in respectively given by t vided always, that i lawful for such commi appeal and justices of at such general quart respectively as aforesai discretion, to state th any case on which s shall be made special opinion of the Court quer in England, Sc Ireland, as the same arisen therein respecti

inference from tautology or unnecessary reservations in its enactments. *Platt*, B.—Supposing the finding of the commissioners of excise on appeal, or of the quarter sessions, to be against the defendant, the act seems to provide no mode of removing the proceedings at his instance. *Alderson*, B.—In earlier times, justices in quarter sessions used to state cases, on appeals to them under the poor laws, for the opinion of the next judge of assize coming into their county. They suspended their judgment in the mean time, and afterwards gave it in conformity with the opinion they obtained. No certiorari was there deemed necessary (*a*)]. The modern practice has undoubtedly been to bring up such cases for the opinion of the Court of Queen's Bench by certiorari. [*Parke*, B.—No absolute judgment is given by the sessions in the cases just alluded to; but the certiorari, which is always issued, may be necessary to insure a true copy of the record, by exposing parties to punishment for a false return. *Alderson*, B.—I doubt whether the terms of 7 & 8 Geo. 4, c. 53, s. 79, take away from either the Crown or the defendant the right of issuing a certiorari to remove proceedings after appeal to the quarter sessions, for the power of stating a case specially for the opinion of this Court is not given till afterwards, viz. by sect. 84.]

The *Attorney-General*, for the Crown.—The court of quarter sessions has suspended its decision, in order to obtain the direction of this Court, so that there is no judgment which could be removed into this Court. If the proceedings at the sessions were brought here by certiorari, they could not be sent back, so that the sessions could not give judgment, and this Court is not competent to do so. All that is sought is the opinion of this Court,

(*a*) See, as to this practice, Tyrwhitt's edit. (6th) of Dickenson's Sessions, 935.

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before the sessions arrive at a final decision. T
cording to the analogy presented by the course i
against assessments by surveyors of assessed taxes
Yarmouth (*a*). [*Alderson*, B.—A case sent by th
Chancery to this Court is entertained here unde
thority of the judicial person who sends it. In
the quarter sessions are empowered by statute t
opinion. *Parke*, B.—The judge in equity is n
by our opinion; so that, were the desired analog
the quarter sessions might decide against our
Their judgment, however, in this case, is conditio
whereas in ordinary sessions cases the court below
or quashes the order of removal, subject to a ca
opinion of the Court of Queen's Bench. Here,
authority to state a case is given by express
Alderson, B.—This case more resembles that of
trator who states a case for the opinion of the C
cording to power expressly given by the rule
ence. There the Court cannot give judgment
award. *Parke*, B.—We need not now decide w
judgment in the alternative can be enforced or n
enactments referred to shew that our opinion is
sought on the same footing as by the Court of C
which tribunal is not bound by it. For in thi
would be a breach of an act of Parliament, if th
sessions did not follow the direction and opinion
from us. The judgment of this Court is not a
and we will therefore give our opinion on the ca
as brought before us by motion on affidavit.]

J. T. Ingham then proceeded to argue the ca
respondents (The *Attorney-General* and *Hall* wi
—The main question is of practical importan

(*a*) 9 Price, 149.

ırmation laid before justices consists of four 'hey convict on the fourth, and acquit on the ı. The defendant serves notices of appeal, ac- 7 & 8 Geo. 4, c. 53, s. 83. At the hearing, ıf appeal holds that the evidence does not sup- onviction on the fourth count, but fully esta- ı charge in the second count. The question whether, under the excise acts, particularly re- 7 & 8 Geo. 4, c. 53, ss. 65, 82, 83, and 84 (*a*),

& 8 Geo. 4, c. 53, he recovery of any osed by any act re- ı revenue of excise, fence has been com- out of the limits of ice, the information ıay be exhibited be- nore justices for the n, or place, wherever ıas been committed; nformation shall be ged, and determined or more like justices, ıuired, on any such having been so ex- l on the appearance of the party against ıs been exhibited, to ıe examination of the in such information to give judgment for penalty or penalties the due examination ore credible witness upon oath, or upon ry confession, &c., ınd to have been in-

ıacts, that in case any shall exhibit any in- ır any person or per- sons against whom any information shall have been exhibited, or who shall appear and claim any goods, &c. alleged to be forfeited, &c., before any justice or justices of the peace as aforesaid, shall feel aggrieved by the judgment given thereon by such justices, it shall be lawful for such officer or such person or persons, upon giving such notice as hereinafter mentioned, to appeal therefrom to the justices assembled at the next general quarter sessions of the peace to be holden in and for the county, &c., town, or place in which such judgment so appealed against shall have been given; and it shall be lawful for the justices of the peace at such general quarter sessions, upon being served with such notice, and they are hereby respectively authorized and required, at such general quarter sessions, to hear, adjudge, and finally determine such appeal; and if, upon any such appeal, either to the commissioners of appeal or justices of the peace at quarter sessions, any defect in form shall be found in the information, or in

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judgment could be given by the court of quarte
for the crown on the second count? By sect. 6
more justices are to decide on excise informatio
the control of the chief office. By sect. 82, in
officer who shall exhibit any information, or an
against whom it shall have been exhibited, shall
grieved by the judgment given thereon by such
such officer or person, on giving the notice of app

any part of the proceedings thereon, or relating thereto, or in the record thereof, every such defect of form shall thereupon be rectified and amended by order of such commissioners of appeal, or of such justices, or the major part of them, assembled at such general quarter sessions, before whom respectively such appeal shall be brought, anything in this act or any other act to the contrary notwithstanding.

[And if there shall not be twenty days between the time of any judgment being given by any justices of the peace on any information exhibited to them, and the next general quarter sessions of the peace, and the party against whom such judgment shall be given shall appeal against the same, then such appeal may be to the quarter sessions next after the expiration of twenty days from the giving of such judgment: 4 & 5 W. 4, c. 51, s. 23.]

By 7 & 8 Geo. 4, c. 53, s. 83, no such appeal as aforesaid shall be allowed, unless the party or parties appellant shall, at and immediately upon the
the judgment appeal
give notice in writin
appeal to the commi
excise, or justices of
respectively, from wl
ment such appeal shal
and also to the adver
parties on such appeal,
lodge such notice at th
with the registrar of
missioners of appeal, o
clerk of the peace for t
of the peace at suc
quarter sessions as af
spectively, by and bef
such appeal is to be
judged and determine
such appeal as aforesai
heard, unless the party
appellant in such ap
within one week at l
such appeal is to be
judged and determined
tice in writing to t
party or parties in su
of the time and place
appeal is to be heard.
viso follows for makin
by appellants of the p
which they shall have
victed.]

ards pointed out by sect. 83, may appeal therefrom to e quarter sessions for the county, &c., or place in which e judgment has been given, who are to hear, adjudge, d finally determine the appeal, with power to amend fects in form in the information, or any part of the proedings. These enactments shew that nothing less than l four counts of the information could be appealed against the sessions; and that accordingly all of them, with the ole decision of the court below, are before this Court. o written statement of grounds of appeal was necessary, that on the simple notice of appeal against the judgment the convicting justices, the new trial could only be on whole. The appeal given by sect. 82 operates by y of removing the conviction into the court of quarter sions; so that every question which could arise on the rmation before the convicting justices was open to the rt of quarter sessions, on appeal to them, by way of v trial on the facts. The rule in civil cases is laid down *The Earl of Macclesfield* v. *Bradley* (*a*), that where a se is sent down to a new trial ex debito justitiæ, and by the discretion of the court, it is open on the whole ord. [*Parke*, B.—When a new trial is granted as avour, terms may be imposed; but where it is a mat- of right, it cannot be granted on part, or as to ne of the defendants, instead of all of them. In ch cases, the result of making a rule absolute for a new al is simply that the jury process is altered, and a new al ordered. Thus, if the jury process was originally to y ten issues and ten defendants, there cannot be new jury ocess to try one or more of several counts, or two issues d two defendants. That would be incongruous, unless e parties can be put under terms.] The principle applies well in criminal as civil cases. Thus, where one issue

(*a*) 7 M. & W. 570; see *Hutchinson* v. *Piper*, 4 Taunt. 555.

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out of four was found against the evidence, t
granted a new trial, not only as to that issue, (for
said cannot be), but for the whole: *Rex* v. *Pool* (*a*)
v. *Bramley* (*b*), two justices had removed a wom
in their order S. W., widow of J. W., with her
to the place of W.'s settlement. On appeal, t
of quarter sessions rejected the appellants' tend
woman S. W. to prove that she was never m
J. W., and confirmed the order of justices, subje
opinion of the Court of King's Bench, whether the
was admissible or not. The Court held it was, and
case back to the sessions; and on the counsel for the
ent requesting that, on the re-hearing, the sessions
confined to the examination of the supposed wi
the witnesses who were to speak to the declarat
without putting the respondents again to the e
proving their case, the Court held that the whole
be gone into again at the quarter sessions, Lor
adding, that in a case in that Court, where the sa
tion was made, Lord *Mansfield* said it was lil
ing a new trial, in which case the whole case
proved. *Edie* v. *The East India Company* (*c*) i
point. [*Alderson*, B.—Suppose the justices from
appeal was made had determined against the p
this first count, and that he had appealed general
way, and had given notice only of an objectio
fourth, could he have gone into an objection to
because the whole matter was before the sessio
could, unless he had misled the other side, for no
grounds of appeal are required by the act. [*Pa*
In truth, an indictment or conviction containin
counts is nothing more than a bundle of different

(*a*) Bull. N. P. 326, Easter Term, 1734; cited Stra. 813.

(*b*) 6 T. R. 330.

(*c*) 2 Burr. 1216;

tions tied together; just the same as if there were several informations in fact, and tied together with one string. A person can be tried on two informations at the same time. [In *Rex* v. *Ward* (*a*), the Court treated two separate counts of an information as separate informations. When called upon to give judgment on the information, with respect to the first count, they called it the first information, and said that, as to the second information, it was not much for defendants to prove if there was a fault in it, for their opinion being that the first was good, judgment could be given against him on the first. Technically, therefore, the trial was on four informations tied together, and all disposed of at the same time on one common plea of not guilty. As the conviction is only on one of them, and the appeal is against that conviction, surely that information only is appealed against by the defendant. This is not an application for a new trial.] The analogy to it is sufficiently strong to rule this case, for the party had an equal right to the appeal. Again, no single count could have been removed by certiorari; so that, whether each count is a separate information or not, there is but one record, and the appeal was under this act in the nature of a new trial on the whole. [*Pollock*, C. B.—A court of error, in awarding a venire de novo on a bill of exceptions, or writ of error on special verdict, does just what this Court does on granting a new trial, and sets aside all the findings. *Parke*, B.—The analogy sought to be established with the case of a new trial fails, because, in the form of granting a new trial, it must necessarily be on the whole record, so that no distinction can there be made. For all that appears on the record is the issue and return of the venire facias juratores; so that, after putting in issue four counts or pleas, you cannot have that venire upon one or less than all, or to try one plea

(*a*) 2 Lord Raym. 1461, 1469.

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only against one defendant. Whether there can be a separate venire de novo where good reason appears for it on the record, is another question, and not settled. *Alderson*, B.—It continually occurs that the verdict is in favour of some of the defendants, and against the others. A new trial is granted against all the defendants. (*Pashley*, contrà.—In *Regina* v. *Gompertz and four others* (*a*), one defendant was acquitted and the other four found guilty, three of right and one wrongly. The Court of Queen's Bench granted a new trial to the defendant wrongly convicted, and to prevent the other who had been acquitted from being tried again, it made a suggestion on the record, in order that it might appear why it was so awarded.) [*Platt*, B.—The recognizances would no doubt apply to one count only. Till a nolle prosequi is entered on some one count as against some one defendant, the whole must go on. *Alderson*, B.—In *Rex* v. *Bramley*, though the Court would not send down the case to the sessions for the hearing of only one witness, they sent it down for the hearing of one point only; and in my practice of twenty years, long since that case, that was often done.] By s. 82, the matter to be appealed against is the judgment given on the information. That in the natural sense means the *whole* information, so as to prevent a garbled new trial. Where power was intended to be given to a court of appeal to reverse or confirm in part, it is so expressly provided, viz. in s. 84. [*Parke*, B.—Suppose the first three counts had required very different evidence to support them from that required to support the fourth, and the defendant had appealed against the judgment given on the fourth count: there would be no notice from the crown of any objection to an acquittal on the other counts; the crown then comes with the same evidence that was ex-

(*a*) Reported, but not on this point, in 16 Law J. (Q. B.) 121.

mined before the convicting justices, and the defendant, who has no notice or expectation that the witnesses examined on those counts will be examined on the hearing of the appeal, must be prepared with them there.] That would be so on the words of sect. 84, and this is an appeal against the whole judgment. [*Alderson*, B.—The plain meaning of sect. 84 is, that the sessions may make a new judgment upon the matter appealed against. That is all.] Nothing in that section, or the rest, is inconsistent with the argument on sect. 82. Further, the officer was not such a party "aggrieved" by this judgment as was obliged to give a notice of cross appeal, for there is only one penalty. [*Parke*, B. —Suppose there had been different penalties on one count.] The evidence set out on this record would shew that there was only one penalty of which evidence could be given, and also that the second count was supported as well as the fourth. [*Alderson*, B.—According to that, the crown might recover a double penalty on the same state of facts. My doubt is, whether the officer should give notice of appeal. If he should, there is no difficulty. If, as you say, the whole matter is before the Court without such notice, in what is the party's situation different from his having notice of appeal?] If the whole record is open, the evidence in the court of appeal would support a conviction in only one penalty, so as to warrant a judgment on one count only. A necessity for cross appeals by one party against one part of the judgment, and by the other party against the residue, might work injustice to defendants and ignorant men. For instance, a defendant might say, "an act of bribery has been clearly proved against me on the fourth count, and I will not appeal." Still, on this construction of the act, a skilful officer, knowing that much stronger evidence existed in support of the second count, might treat it as the only part of the record to which a court of appeal could look, and give notice of appeal accordingly. He would establish the charge on the second count, and the quarter sessions

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would be driven to give judgment for another penalty. [*Alderson*, B.—The excise officer is not appealing. *Pollock*, C. B.—Cross appeals are common in the Privy Council and House of Lords. *Platt*, B.—It would be new in crown cases, if the crown appealed against part of a judgment and the defendant as to the rest.] This act applies only to proceedings in courts of quarter sessions on appeals against convictions. Now, as cross appeals are unknown in such cases, there the act cannot be construed to embrace crown cases. [*Pollock*, C. B.—In the case you put, of an appeal by the officer against the judgment of the justices as to the second count, the sessions would have to inquire whether the evidence by which it was supposed to be sustained had not been used upon the fourth count, so as to be inapplicable to any other. *Parke*, B.—On imposing the penalty under the discretionary power given by sect. 84, they would inquire whether the party had not been convicted of the same offence under the other count, in which he had acquiesced.] It is a sufficient answer that the quarter sessions would not be bound so to inquire. But here the officer could not appeal, not being the party aggrieved. The appeal being against the whole under the defendant's notice, a like appeal having been given to the crown under the act, the defendant could not turn round and urge that his appeal was only as to part. Sect. 82 means that a person cannot take the privilege of appealing without its attendant burden of the condition imposed by the act, viz. that the whole record shall be inquired into and adjudged on.

Secondly, the second count, to which the crown proposes to shift the judgment, is good, and the conviction, as it stood originally, can be supported. That count alleges, that the defendant did offer to give to a certain officer of excise divers, to wit, two securities for sums of money, amounting together to the sum of £20 of lawful money of Great Britain, (that is to say), two promissory notes, each of them for the payment of £10, in order to corrupt, &c., without alleg

ing them to be unsatisfied. The count rests on the words of 7 & 8 Geo. 4, c. 53, s. 12, viz. that "if any person shall directly or indirectly give or offer, or promise to give to such officer or person so employed as aforesaid, any sum of money or other recompense or reward whatsoever, or any security for any sum of money or other recompense," he shall incur penalties. Now this count, by averring the value of the notes, alleges more than is required by those words. [*Platt*, B.—Would this enactment be infringed by an offer of two promissory notes, which had been paid?] Those might not still be "securities for money." In many cases it would be impossible to prove the allegation if made thus. An offer to an excise officer of two good securities for the payment of £20, which the party stated himself to have in his pocket, would be an offer of a bribe, and yet the nature or value of the security would not lie in the knowledge of the prosecutor.

In an indictment for stealing from a dwelling-house, the statement of the value of the thing stolen is necessary by the express words of 7 & 8 Geo. 4, c. 29, s. 12, but the value of materials suspected to be purloined need not be stated in a conviction for being in possession of them, no words being found in 17 Geo 3, c. 56, s. 10, to make such averment requisite. In that case, *Parke*, B., suggested, that the distinction originally existing at common law between grand and petty larceny, made it then necessary to allege the value in an indictment for larceny, in order to determine the punishment. But *Regina* v. *Bothroyd* (*a*) shews that it depends on the wording of the particular statutes, whether the value of a "security," or its remaining unsatisfied, need be stated in a conviction. Stat. 7 & 8 Geo. 4, c. 29, s. 5 expressly places the stealing of a security for money on the same footing, as to punishment, as the larceny of the money due on the security so stolen,

(*a*) 15 M & W. 1.

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"or secured thereby and remaining unsatisfied;" so that, if stolen in a dwelling-house, and partially satisfied to an extent not leaving £5 due, the allegation as to its remaining unsatisfied would be material in an indictment. It is shewn in *Regina* v. *Boothroyd*, that the value of an article obtained by false pretences must be alleged, because the party may, on that indictment, be convicted of larceny (*a*). So in an indictment for embezzlement, *Rex* v. *Johnson* (*b*), in order to meet the formal rule established as to indictments for larceny, while the distinction between grand and petty larceny existed. [*Parke*, B.—Embezzlement, since 39 Geo. 3, c. 85 and 7 & 8 Geo. 4, c. 29, s. 27, is treated in the same way as larceny, though the master has not had the possession of the thing received and embezzled by the servant. Stat. 39 Geo. 3, c. 85 was occasioned by the decision in *Bazeley's case* (*c*). Whether the indictment could be for larceny is not now in question. [*Parke*, B.—The defendant here did not promise to give a security for money, but offered to give a specific security. That offer must be of some specific security or thing, but might occasion difficulty in describing what the security was.] In *Rex* v. *Johnson*, *Le Blanc*, J., says, "Here, then, the indictment states that the prisoner received divers, to wit, nine bank notes &c., upon which it was argued as if bank notes were not the specific thing made the subject of larceny. For when a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary, in charging a larceny of a sheep, to describe it either as a wether, ewe, or lamb (*d*). Yet it cannot be doubted, if such an argument could prevail, that

(*a*) 15 M. & W. 12, 13.

(*b*) 3 M. & Sel. 539; 2 Leach, 1103; Hil., 1815.

(*c*) 2 Leach, 973; East's Pleas of the Crown, 571, Feb. 1799.

(*d*) Quære, since 7 & 8 Geo. 4, c. 29, s. 5; see cases collected in *R.* v. *M'Culley*, 2 Mood. C. C. 34; Dickenson's Sessions, by Tyrwhitt, 6th ed. 222.

would be of advantage to the prisoner that it should be described more particularly; because if it were, and the prosecutor should, in such case, fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also it may be said of bank notes; it is not necessary to describe it particularly as a bank note for the payment of £1, £5, or £20, because, for whatever sum it may be payable, it is still a bank note. In like manner, in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument upon this part of the case has arisen from the practice that has prevailed, of describing the particular price for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or another, it is equally a bank note." Next, the four months' limitation of suing for the penalty is not provided for in the clause which constitutes the offence and imposes the penalty, but is prescribed by a subsequent act (*a*). [*Parke*, B.—Then that needed not to be noticed at all in the information, as it must come from the defendant (*b*).]

Pashley, contrà.—No amendment would be requisite if the information was good in form. But, first, the quarter sessions had no jurisdiction to give judgment on the second count; and secondly, if a discretion to entertain that question is conferred on the quarter sessions by that

(*a*) By 4 & 5 Will. 4, c. 51, s. 19, every information for the recovery of any penalty, or for the condemnation of any seizure, shall be exhibited before the commissioners of excise, or justice or justices of the peace respectively, within four calendar months next after the offence or offences alleged in such information shall have been committed.

(*b*) *Steel* v. *Smith*, 1 B. & Ald. 94; *Spieres* v. *Parker*, 1 T. R. 141; see Id. 320, and 7 T. R. 27.

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act, no decision that court might come to in the exercise of that discretion can be reviewed here, any more than the mitigation of a penalty. [*Parke*, B.—The defendant's notice of appeal was not against so much of the judgment of the convicting justices as was in his favour, but only against that part which was adverse to him, and by which he was aggrieved, that is, by the judgment on the fourth count.] In courts of error, a man cannot assign errors on anything decided in his favour, unless it be so decided by an error of the court. In point of law, each count imports the charge of a totally different offence. [*Parke*, B.—Though you would begin by assuming that the several offences charged in the record were different, that is merely primâ facie so, for the fact may be that there was but one offence.] The question of the innocence of a party charged, when decided in his favour by a court of competent executive jurisdiction, passes in rem judicatam, and cannot be re-opened by the crown. [*Alderson*, B.—The clause giving the appeal is framed in an extraordinary manner. The quarter sessions are to "re-hear upon oath, and to re-examine the same witness and witnesses, and re-consider the same evidence." That is confounding "witness" with "evidence." Suppose, from whatever cause, that different evidence is given? The sessions are not to "examine any evidence, or any witness or witnesses, other than or different from the evidence and the witness or witnesses which and who shall have been before examined;" so that if a witness swore one thing below, and the exact contrary at the quarter sessions, the latter court is to act as if he had always sworn the same thing.] The legislature contemplated some person other than the party proceeded against as the party to appeal. The party aggrieved, whether officer or defendant, was to be the appellant. [*Alderson*, B.—Suppose there to be cross appeals, in one of which, as in this case, the defendant appeals against the judgment on the fourth count, and the officer appeals against the judgment on the second count, according to

the argument, the court might give judgment on the first.] Further, the officer might give notice that he abandoned his appeal, and yet, if by necessary intendment of law that appeal is against the whole judgment, he might next day claim to support his appeal. A proceeding by information is to be as strictly considered as an indictment: see Bac. Abr. tit. Information (A.). The case of *Rex* v. *Poole* (*a*) appears contrary to the later case of *Parker* v. *Godin* (*b*). There, in trover for plate and other chattels, the verdict was for the defendant. On motion for a new trial, the verdict was held wrong as to the plate, and right as to the rest, but a difficulty arose, as the new trial must be granted on the whole. But, on consideration, the Court held that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them. But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial at all events. In *Regina* v. *Gompertz* (*c*), the Court of Queen's Bench held that a new trial may be granted to defendants who are found guilty, without a new trial against co-defendants who are acquitted and entered a suggestion on the record accordingly. [*Alderson*, B.—The effect of granting a new trial is, that the previous trial does not appear on the record.] The Court in banc has a general supervision over all the proceedings at Nisi Prius, and exercises equitable discretion in granting new trials. Thus, in a civil case, *Fisher* v. *Birrell* (*d*), a rule was made absolute for a new trial as to an issue the verdict on which was against the evidence. [*Alderson*, B.—Every new trial is, strictly speaking, an application to the discretion of the Court, which is exercised with analogy to the rule prevailing as to a venire de novo,

(*a*) Bull. N. P. 326; Easter Term, 1734.
(*b*) Stra. 813.
(*c*) Reported, but not on this point, in 16 Law J., Q. B., 121.
(*d*) 2 Q. B. 239.

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to which a party is sometimes entitled as of right. We exercise a like discretion as to costs on granting a new trial.] In *Reg.* v. *Mawbey* (*a*), the decision is rested on the ground of the whole matter being within the discretion of the Court for the ends of justice; but a defendant acquitted before a tribunal competent to try him has never been subjected to a new trial for the same offence. [*Parke*, B.—An application for a new trial is wholly irrespective of statute law, whereas appeals rest on positive enactment, and the whole question is, what appeal is given in terms by the particular statute.] *Reg.* v. *Stock* (*b*) shews that the power of appeal cannot exist by implication only. In this case, as the appeal is only given to the party aggrieved, no question can arise on the other counts, except on appeal by a party who does not appeal, viz. the officer. [*Alderson*, B.—Sect. 83 does not provide for giving grounds of appeal, but only for notice of it.] This information is exactly on the same footing as if the offences charged in each count had been laid in different informations, and is merely a collection of them in one piece of paper, which, for convenience, is tried at one time. [He alluded to *O'Connell* v. *The Queen* (*c*), and *Campbell* v. *The Queen* (*d*).] In one case, indeed, in Foster (*e*), the prisoners were indicted for murder, Swan as principal in the first degree, and Jefferys for being present aiding and abetting. Their trial was postponed, and at the next assizes another bill was found against them, charging Swan (a servant of the deceased) with petit treason, and Jefferys with murder. On their arraignment on the second indictment, they pleaded ore tenus, that another indictment was pending for the same offence, and pleaded over to the treason and felony. On demurrer ore

(*a*) 6 T. R. 619.

(*b*) 8 Ad. & Ell. 405; see Dickenson's Sessions, 6th Ed., 614.

(*c*) 11 Clark & Fin. 295.

(*d*) 15 Law J., (M. C.), 76.

(*e*) Case of *Swan and Jefferys*, Foster's Crown Law, 104, A.D. 1751.

enus by the crown, the Court held against the plea, for that uter fois arraign was no plea; but that would hardly be eld now, so as to put an acquitted prisoner again on his rial. [*Alderson*, B.—That is not so clear; could a man ndicted for murder, and charged with it also on the coroner's nquisition, plead the latter as lis pendens to the indictment? *Pollock*, C. B.—Nothing but the practice to the contrary prevents felonies entirely different from being charged in the same indictment, and tried together (*a*).] In misdemeanour that is still common, and different persons are charged in different counts (*b*). [*Alderson*, B.—At periods much later than that of the Stuarts, the practice of the Old Bailey, now disused, was to charge the jury with the various offenders charged with murder, petty larceny, &c., at once, and one verdict was pronounced on the whole.] Suppose that one information was laid against ten different persons for ten different offences, could an appeal by one, who was convicted, open the whole record against the nine who were acquitted?

J. T. Ingham, in reply.—In *Beecher's case* (*c*), it was thus resolved:—"In process or delay which is for advantage of the party, he shall not assign it for error, but in the case at bar the judgment is not perfect, for the amercement ought to be parcel of the judgment, and it is also for the king's advantage, and therefore divers judgments have been reversed in the King's Bench, because the judgment was *ideo in misericordiâ* where it should be *capiatur*, and yet it was for the party's advantage; but because the judgment was erroneous, and the error was of the Court in giving it, for this cause it has been often adjudged that it is not amendable, but the whole judgment shall be reversed." The

(*a*) See *R.* v. *Eggington*, 2 B. & P. 508; *R.* v. *Thompson*, 2 East, P. C. 515.

(*b*) As to this, see *R.* v. *Trafford*, 1 B. & Adol. 874.

(*c*) 8 Rep. 58 b.

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analogy of this case is perfect, for in the first place the mistake was of the court in entering judgment for the defendant on the second count, and further, the crown is interested. Again, there is no doubt that the clause giving the appeal is to be read strictly, and it gives no appeal against anything but the judgment, that is, the entire decision of the justices on the whole information. Nor could the officer appeal, for in this instance he was not the party aggrieved, having gone only for one penalty, and got a judgment in his favour. Primâ facie the several counts imported several offences, but it clearly appears from the evidence set out in the conviction, that they were all directed against one offence only, and went for but one penalty, so that the appeal must have been against the entire decision of the justices.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this special case, stated for our opinion by the learned recorder of Leeds, under the authority of 7 & 8 Geo. 4, c. 53, we are of opinion that the judgment of the court of appeal could not have been given for the crown on any count but the fourth. We are also of opinion, that, as the learned recorder decided on the hearing that there was no evidence to sustain the fourth count, the defendant is entitled to be altogether exonerated from the charges in the information. The facts are shortly these:—The defendant was brought before magistrates of the borough of Leeds to answer an information by the excise, consisting of four counts, and was convicted on the fourth count only. He thereupon appealed against this conviction and judgment to the quarter sessions for the borough, giving the notice of appeal required by the act. The officer prosecuting for the crown gave no notice of appeal against the judgment of the justices on the second

any other of the first three counts. By s. 84 of the above t, the court of appeal is confined to re-hear the same evi- nce and witnesses as had been examined below. Upon e re-hearing, at the borough quarter sessions, the learned order thought that the testimony given did not sustain e charge on the fourth count, and that the defendant was itled to an acquittal upon it. It was then contended that e crown was entitled to judgment upon the second count, the ground that, under the 84th section of 7 & 8 Geo. 4, 53, the whole case was re-opened before the court of ap- l, so that evidence might be given there in support of e charge in the second as well as of that in the fourth unt; and consequently, that, notwithstanding the judg- nt appealed against had been limited to the fourth count, e court of appeal could reverse or affirm the whole or rt of that decision, and give a "new or different" judg- nt, so as to acquit the appellant on the fourth count, on ich he had been convicted, and convict him under the ond count, on which he had been acquitted. For the fendant it was answered, that the scope of the inquiry fore the court of appeal was limited to the charge in the urth count, in respect of which only was there any notice appeal; and that, as the recorder was of opinion that re was no evidence to support that charge, the appellant s entitled to a general discharge or acquittal; and we e of that opinion. The learned recorder appears to have ubted his power to go into the case on any other count an the fourth, and we think his doubt in that respect s well founded. The judgment of the convicting justices ing against the information as to three of the counts con- ned in it, it was as open to the officer to appeal against t part of their judgment, as to the defendant to appeal inst their judgment on the fourth count, which was ad- se to him. But the defendant alone appealed. Now, it cannot be taken that any man would appeal against a gment in his favour, the defendant could not be sup-

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posed to have intended by his appeal to insist that he was "aggrieved" (the expression of the statute) by the judgment of the justices on the second count. This notice of appeal, then, did not affect that judgment, which, as far as he was concerned, stood unappealed against. Then, as the officer did not avail himself of that power to appeal against it in order to obtain a conviction, which is expressly given him by the same section (*a*), the defendant would naturally go before the quarter sessions prepared only to refute the charge against him on the fourth count, which might have been of a character totally different from that laid in the other counts. In the absence of any notice of appeal against the judgment in his favour on the first three counts, he may reasonably be supposed to have relied on that judgment as binding on the prosecutor. If the crown wished to rely on any other count besides that on which the justices had convicted, their officer had a perfect right to appeal in respect of the counts, or any of them, upon which the defendant had been acquitted. But we think that in such a case the statute makes it equally incumbent on the crown as on the defendant to give notice of appeal; and in the absence of such notice on either side, the inquiry before the court of appeal must be limited to the particular charge affected by the notice actually given. This point is decisive of the whole case, and no other point need be adverted to. For these reasons, we shall direct that the recorder do give judgment for the appellant altogether.

The following was the rule for judgment:—

"In the Exchequer,

"Monday, the 1st day of February, 1847.

"The Queen *v.* S. G. Gamble.

"Whereas the 28th day of January last having been appointed by the Court for the argument of the special case

(*a*) 7 & 8 Geo. 4, c. 53, s. 82; ante, p. 401, note.

ıbmitted by the recorder of the borough of Leeds, for its pinion upon certain points reserved by the said recorder, nd for counsel on both sides to attend, on which day the ame came on accordingly, when, upon hearing Sir *J. Jervis*, Knight, her Majesty's Attorney-General, Mr. *Ingham*, and Mr. *Hall*, respectively of counsel on behalf of her Majesty, nd Mr. *Pashley*, of counsel on behalf of the said S. G. Gamble, and upon reading the record of the proceedings led in the office of her Majesty's remembrancer of this Court, the matter was adjourned for the judgment of the Court until this day. Now the Court declare, that the recorder of the borough of Leeds had not the power to amend e conviction of the justices of the peace for the said rough, and to find the said S. G. Gamble guilty on any her count of the information exhibited against him before e said justices, other than the fourth count of the said formation, and for which offence on the said fourth count had been convicted by the said justices, and against hich conviction the said S. G. Gamble had appealed to e quarter sessions of the said borough, and do therefore ereby order and direct that the order of the quarter sessions of the said borough of Leeds, reversing the decision f the said justices on the fourth count of the information xhibited against the said S. G. Gamble, be and the same s hereby confirmed, and that the conviction of the said S. G. Gamble by the said justices be and the same is hereby quashed and set aside.

"Entered H. W. VINCENT,
"Queen's Remembrancer."

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Jan. 29.

A testator devised lands to P. M., his brother for life, remainder to the use of the first son of the body of P. M. for life; remainder to the use of the first son of the said first son, and the heirs male of his body; and in default of such issue, to the use of all and every other the son and sons of P. M., severally and successively, for the like interests and limitations as he had before directed respecting the first son of P. M., and his issue of the body: and in default of issue of the body of P. M., or in case of his not leaving any at his decease, then over.

P. M. never had any issue.

Held, that all the limitations after that to the use of the first son of the body of P. M., were void for remoteness, and that the sons of P. M., if he had any, would not, by the application of the doctrine of cy-pres, have taken an estate tail, inasmuch as such a construction of the will would be to make the estate devolve in a line of succession different from that which the testator had expressly designated.

MONYPENNY *v.* DERING and Others.

THE following case was sent by Vice-Chancellor *Wigram* for the opinion of this Court.

James Monypenny, late of Maythorn Hall, in the parish of Rolvenden, in the county of Kent, was, at the time of the making of his last will and testament hereinafter mentioned, and thenceforth up to and at the time of his death, seised in fee simple or otherwise, well entitled to the manors or reputed manors of Maythorn, Nether Forsham, and Kensham, in the said county of Kent, and also to the mansion-house called Maythorn Hall, in the said parish of Rolvenden, and to divers messuages, lands, tenements, and hereditaments, situate respectively in the several parishes of Rolvenden, Tenterden, Benendon, Landhurst, Newenham, Saint Mary in Wittersham, and Stone in the Isle of Oxney, in the county of Kent, all which said hereditaments and premises were of gavelkind tenure.

The said James Monypenny, being so seised or entitled as aforesaid, and being of sound and disposing mind, on the 11th day of February, 1804, duly made and published his last will and testament in writing, dated the 11th day of February, 1804, and duly executed and attested as by law was then required for passing real estates by devise, and thereby (after devising certain lands not comprising any of the hereditaments hereinbefore specified, in manner therein appearing) he devised the residue of his said real estates as follows:—"I give and devise my said house, called Maythorn Hall, with all and every the appurtenances, and also all the rest, residue, and remainder of my manors, messuages, farms, lands, tenements, and hereditaments, and real estate whatsoever, in possession, reversion, remainder, or expectancy, (except as hereinbefore devised), to the uses, intents,

of the first son of the body of the said Phillips
ıny, for and during the term of his natural life;
ı and immediately after his decease, to the use of
son of the said first son, and the heirs male of his
ıd in default of such issue, to the use of all and
her the son and sons of the body of my said
Phillips Monypenny, severally and successively, ac-
o seniority of age, for the like interests and limita-
I have before directed respecting the first son, and
of the body, of my said brother Phillips Mony-
And in default of issue of the body of my said
Phillips Monypenny, or in case of his not leaving
is decease, to the use of my said brother Thomas
ıny, for and during the term of his natural life,
impeachment of waste; and from and immediately
decease, to the use of Thomas Monypenny, eldest
y said brother Thomas Monypenny, for and dur-
term of his natural life, without impeachment of
nd from and immediately after his decease, to the
e first son of the body of the said Thomas Mony-
on of my said brother Thomas Monypenny, and
male of his body; and in default of issue of the
the said Thomas Monypenny the son, to the use
d every other the son and sons of the body of my
her Thomas Monypenny, for the like estates and

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entitled to the real or copyhold estate, or any part thereof, late of Elizabeth Joddrell, widow, daughter of the late Phillips Gybbon, situate in the said parish of Rolvenden, or in the parishes of Benendon, Tenterden, or either of them, or elsewhere, then and in that case, and immediately upon such an event taking place, the said estates hereinbefore devised for the benefit of my said brothers and their issue, shall be and remain to the use of the next person entitled thereto under and by virtue of this my will, in the same manner as they would have done if the person so succeeding to the said estates late of the said Elizabeth Joddrell were actually dead. And I declare that my said devisees, as they may hereafter respectively become entitled to my said estates, shall be at full liberty to fell and cut all such timber and underwood as will not improve by standing, and shall not be impeached or impeachable for such waste; and shall and may, as they respectively become entitled, grant leases of my said estates, or any part or parts thereof, not exceeding seven years, so that such lease and leases be granted for the best and most improved rent that can be procured for the same, and so that no sum or sums of money be paid by any lessee or lessees in consideration for such lease or leases."

After the date of the will, and before the date of the codicil afterwards stated, the testator's brother, Thomas Monypenny, died, leaving his son Thomas, named in the will, him surviving, and such son afterwards took the name of Thomas Gybbon Monypenny.

On the 26th day of July, 1818, the said testator, James Monypenny, being of sound and disposing mind, duly made and published a codicil to his said will, dated the 25th day of June, 1818, and executed and attested as by law was then required for passing real estate by devise, and therein recited that his brother Thomas had died; and after reciting that by his said will he gave and devised his said house called Maythorn Hall, with all and every the appurtenances,

ythorn Hall, with all and every the appurtenances,
id every other his said manors &c., hereditaments,
estate whatsoever, to the uses, intents, and pur-
einafter expressed and referred to, (that is to say):
se, intent, and purpose that his wife should receive
the issues and profits thereof from the time of his
or and during the term of her natural life, without
ent of waste, but subject to the keeping up, sup-
nd maintaining the buildings and fences belonging
and from and immediately after her decease, to
the same uses as were declared of the said house,
c., hereditaments, and real estate, by his said will,
ct to the declaration contained in his said will, in
said brothers or either of them, their or either of
e, should become entitled to the said estate of
Joddrell, widow. And the said testator ratified
med his will in all other respects.

id testator, James Monypenny, afterwards made
codicils to his said will, neither of which in any
fected the disposition of his real estate made by
ill and first codicil.

id testator James Monypenny died in June, 1822,
aving in any manner revoked or altered the dis-
f the said Maythorn Hall estate, made by his will
codicil, and leaving him surviving his wife Mary
ny, and his brother the said Phillips Monypenny

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year 1826. After the widow's death, the said Phillips Monypenny, the brother of the testator, entered into the receipt of the rents and profits of the said estates, and continued in such receipt until the time of his decease. In Michaelmas Term, 1827, Phillips Monypenny duly suffered a common recovery of the devised estates, in which he was vouched, and vouched over the common vouchee, and such recovery was declared to enure to the use of the said Phillips Monypenny in fee. By a settlement executed on the marriage of Robert Joseph Monypenny, the nephew of the said Phillips Monypenny, with the defendant Susannah Monypenny, dated 10th June, 1835, the said Phillips Monypenny charged the said Maythorn Hall estate with the payment of a jointure of £300 per annum to the said Susannah Monypenny, in the event of her surviving the said Phillips Monypenny and Robert Joseph Monypenny. In January, 1841, Phillips Monypenny died, without ever having had any issue, but having made a will, by which he devised the Maythorn Hall estate to certain uses in favour of his nephew the said Robert Joseph Monypenny for life, with remainder to his eldest son Robert Phillips Dearden Monypenny for his life, with remainder to his first and other sons successively in tail male, with divers remainders over. On the death of the said Phillips Monypenny, the said Robert Joseph Monypenny entered into the receipt of the rents and profits of the said Maythorn Hall estate, by virtue of the said devise to him in the will of the said Phillips Monypenny, and continued in such receipt until the time of his death. In September, 1842, the said Robert Joseph Monypenny died, leaving the said defendant Susannah Monypenny his widow, and Robert Phillips Dearden Monypenny his only son, then an infant of the age of six years, him surviving; and the said Robert Phillips Dearden Monypenny thereupon, by two of his guardians (being the defendants Susannah Monypenny and Peregrine Royds Dearden) entered into the receipt of the

rents and profits of the Maythorn Hall estate, subject to the jointure of his mother the said Susannah Monypenny, and is still in possession of the said estates, by virtue of the devise to him in the said will of the said Phillips Monypenny.

The said Thomas Gybbon Monypenny has become entitled to and is now in the possession of the estates of the said Elizabeth Joddrell. The said Thomas Gybbon Monypenny is married, and the plaintiff, Robert Thomas Gybbon Monypenny, is his first son. The defendants Thomas Gybbon Monypenny, Robert Phillips Dearden Monypenny, James Isaac Monypenny, Phillips Monypenny, and William Backhouse Monypenny, are the co-heirs, or represent co-heirs of the testator James Monypenny, at the time of his own death and of the death of the testator Phillips Monypenny.

The plaintiff, the said Robert Thomas Gybbon Monypenny, claims the Maythorn Hall estate as tenant in tail male thereof, by virtue of the devise to him as the first son of the said Thomas Gybbon Monypenny, in the will of the said testator James Monypenny. The defendant, the said Robert Phillips Dearden Monypenny, claims to retain the possession of the said Maythorn Hall estate, as devisee for life under the will of the said Phillips Monypenny, subject to his mother's jointure, on the ground that the said Phillips Monypenny acquired the fee simple of the said estate by the said common recovery suffered by him in 1827; and he also claims as representing two of the co-heirs in gavelkind of the testator James Monypenny, in case the limitation in the will of James Monypenny, succeeding the limitations to the first son of Phillips Monypenny for life, should be held to be void. The defendant, Thomas Gybbon Monypenny, claims the Maythorn Hall estate, as tenant for life thereof by virtue of the devise to him in the will of the said testator James Monypenny, on the ground that it did not shift from him on his accession to the estates of Elizabeth

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Joddrell, and also he claims by descent as one of the co-heirs in gavelkind of the testator James Monypenny, in case the limitations in the will of James Monypenny, succeeding the limitation to the first son of Phillips Monypenny for life, should be held to be void. The said Susannah Monypenny claims her said jointure of £300 under the said settlement of 1832, on the same grounds upon which her said son, the said Robert Phillips Dearden Monypenny, claims his life estate.

The other defendants, representing co-heirs in gavelkind of the said James Monypenny, claims the said Maythorn Hall estate, on the ground that the limitations in the will and codicil of the said James Monypenny, after the devise to the first son of the said Phillips Monypenny, were void.

The questions in this case have reference to these conflicting claims. The questions for the opinion of the Court are:—

First, what estate or estates, in possession or in remainder, did Phillips Monypenny take under the will and codicil of the testator James Monypenny in the devised property?

Secondly, did Thomas Gybbon Monypenny take any and what estate or estates in the devised property, under the same will and codicil?

Thirdly, did Robert Thomas Gybbon Monypenny take any and what estate or estates in the devised property, under the same will and codicil?

Fourthly, did Phillips Monypenny acquire any and what estate in the devised property, under the recovery of 1827?

Fifthly, did Susannah Monypenny take any and what estate or interest in the devised property, under the deed of the 10th of June, 1835?

Sixthly, did the co-heirs in gavelkind of the said testator, at his death, take by descent from the testator James Monypenny any and what estate in the devised property?

Each party is to be allowed to refer to the will of the testator James Monypenny as part of this case.

The case was fully argued in Easter Term, 1846, (April 29th, May 4th and 5th), by

Hodgson, for the plaintiff.
C. Hall, for the defendant Thomas Gybbon Monypenny.
Malins, for Robert Phillips Dearden Monypenny.
Whitehurst, for some of the co-heirs in gavelkind.
Coote, for Susannah Monypenny; and
Willcock, for the other co-heirs in gavelkind.

The arguments are fully stated in the judgment of the Court, which was now delivered by

ROLFE, B.—This case, which has been sent to us for our opinion by Vice-Chancellor *Wigram*, turns entirely on the construction of the will of James Monypenny, dated the 11th day of February, 1804.

The testator, at the time of making his will, was seised in fee of a house in Kent, called Maythorn Hall, and of other property in that county, all of gavelkind tenure; and by his will he gave the said house, called Maythorn Hall, and all the residue of his real estate, "to the use and intent that my brother Phillips Monypenny may receive the rents and profits thereof during his life, and after his decease to the use of the first son of the body of the said Phillips Monypenny for his life, and after his decease to the first son of the body of such first son, and the heirs male of his body; and in default of such issue, to the use of every other son of my said brother severally and successively, according to seniority of age, for the like interest and limitation as I have before directed respecting the first son and his issue; and in default of issue of the body of my said brother, or in case of his not having any at his decease, to the use of my brother Thomas; and after his decease, to the use of Thomas, the eldest son of my

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said brother Thomas, for his life; and after his decease, to the use of the first son of the body of the said Thomas the son, and the heirs male of his body; and in default of issue of the body of the said Thomas the son, to the use of every other son of my said brother Thomas, for the like estates and interests, severally and successively, according to seniority of age; and in failure of all such issue of the body of my said brother Thomas, to the use of him, his heirs and assigns."

The will then contains a proviso, that if either of the testator's brothers or their issue should become entitled to the Joddrell estate, then the estate thereby devised for the benefit of his said brothers, and their issue, should remain to the next person entitled thereto, in the same manner as if the person succeeding to the Joddrell estate was dead.

Before the year 1818, Thomas, the brother, died, leaving his son Thomas, who took the name of Gybbon before that of Monypenny, and was thenceforth called Thomas Gybbon Monypenny. By a codicil, dated the 25th July, 1818, the testator gave to his wife a life interest in the property in question, but in other respects confirmed his will.

The testator died in June 1822, and, on his death, his widow entered on the property in question, and held and enjoyed it till her death in 1826. On her death, Phillips Monypenny entered on and held and enjoyed the property until his death in January, 1841, having in 1827 suffered a recovery of it, and declared the uses thereof to himself in fee. Phillips Monypenny never had any issue.

Since the death of Phillips Monypenny, the parties claiming under the recovery have been in the enjoyment of the property.

Thomas Gybbon Monypenny has since become entitled to the Joddrell estate, and he has an eldest son, Robert Thomas G. Monypenny.

There are four claimants, or rather classes of claimants, to the estate:—

First, Robert Thomas G. Monypenny. He contends at Phillips Monypenny took an estate for life, with remainder to his first and other sons sucessively in tail male, ith remainder to Thomas Gybbon Monypenny for life, ith remainder to him Robert Thomas Gybbon Monypenny tail male; and so that Phillips Monypenny having died ithout issue, and Thomas Gybbon Monypenny having ceeded to the Joddrell estate, Robert Thomas Gybbon onypenny has become entitled as tenant in tail male in ccession.

Second, Thomas Gybbon Monypenny adopts the same nstruction of the will as that contended for by the son, cept that he contends that the shifting clause did not take fect, and so that he is entitled to a life estate, prior to the tate tail of his son.

Third, the parties claiming under the recovery and the ill of Phillips Monypenny, argue that he took an estate il, and so by the recovery acquired an absolute estate in e simple.

Fourth, the co-heirs of the testator contend, that Phillips onypenny took an estate for life only, with remainder to s eldest son for life, and that all the subsequent remainders ere void for remoteness; and so that, on the decease of hillips Monypenny in 1841, without issue, the co-heirs of e testator became entitled.

The claim as well of Robert Thomas Gybbon Monypenny of his father Thomas Gybbon Monypenny, is founded on e hypothesis that the sons of Phillips Monypenny, the st tenants for life, if any such there had been, would have ken in succession as tenants in tail male. Now there is rtainly no express gift to them as tenants in tail; but it contended, that, in order to effectuate the testator's neral or leading intention, they must be held so to take, cording to what has been called the doctrine of approxistion, or cy pres; and as much turns in this case on the estion whether that doctrine does or does not apply,

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it will be right to consider in the first place what the doctrine is.

The doctrine of cy pres, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. In such cases, the law, in order to prevent the testator's intention from being entirely defeated, has treated his *expressed intention* as divisible into two parts: first, the intention that the first taker and his issue male or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers. And the two intentions being thus ascertained, the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention, shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means, the estate, if left, as it were, to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be divested from that course by the act of the first taker. Whether, in such a simple case as that which we have stated for the purpose of explaining the doctrine, it might not have been better originally to act on a different principle,—to have said that the two intentions were blended together, and so that the language of the will afforded no

guide to shew what the testator intended, in a case where his will in its integrity could not be carried into effect, is a matter in which it would be vain to speculate. The doctrine has been long recognised, and we should be unsettling land-marks if we were to call it in question. The doctrine is nowhere more clearly stated than in a note of the late Mr. Butler, at the end of Fearne's Chapter on the rule in *Shelley's case* (*a*). "The cases," says Mr. Butler, "in which this doctrine has been received, have arisen on devises in which the testator has expressed himself in terms which have been thought by the Courts to contain a clear indication that the devisee and his issue should take the lands, and an intimation of the mode in which he intended the issue should take them; and his language, in respect to the mode of the issue's taking them, has been thought by the Courts to be such as, construed literally, imported limitations contrary to law. In construing these devises, the Courts have considered that the testator's primary object was that the issue of the devisee should take the land, and that the mode in which the issue should take it was the testator's secondary object, or, as it has been usually expressed, that the former was his general the latter his particular intention. Then, in conformity to their uniform practice of effecting the testator's intention as far as possible, they have thought themselves required to adopt that construction of the devise, which, by including the devisee, satisfied the testator's general intention that the issue should take, but which, at the same time, by raising in the issue estates different from those which the testator appeared to have intended them, sacrificed to that extent his particular intention. Thus, where the testator has devised lands to a person and his issue, and has appeared to intend to devise estates by purchase to the children of unborn children of the devisee, the Courts have considered such limitations contrary to law; but as the will has appeared to

(*a*) Fearne, Cont. Rem. 204.

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them to shew an intention that the issue should take, and this intention could be effected by the issue's taking derivatively through the ancestor, the Courts, rather than the testator's intention should absolutely fail of effect, have put such a construction on the devise as vested the inheritance in the ancestor himself. Such a construction brings all the parties intended to be benefited by the testator within the operation of the devise, and thus satisfies the testator's general intention; but in respect of the mode in which the testator would be thought by the literal meaning of his language to intend they should take, this is materially varied, and thus his particular intention is sacrificed."

Such being the general doctrine, we have only to see whether it is applicable to the will now before us, so as to give estates in tail male to the sons of Phillips Monypenny. The devise is to Phillips Monypenny for life, and after his death to the first son of Phillips Monypenny for his life, and after his decease to the use of the first son of such first son and the heirs male of his body, and in default of such issue, to the use of every other son of Phillips Monypenny, severally and successively, according to seniority of age, for the like interest and limitation as in respect of the first son and his issue, and in default of issue of Phillips Monypenny, then over. Here, it will be observed, no estate is given to any other grandson of Phillips Monypenny, except the eldest son of each of his sons; so that if Phillips Monypenny had left two sons, and the eldest of those sons had had two sons, on the death of Phillips Monypenny and his eldest son and grandson, and failure of issue male of the eldest grandson, the estate would, according to the testator's express intention, have gone, not to the second grandson, but to the second son of Phillips Monypenny, and so through the whole line of Phillips Monypenny's sons. In this case, therefore, it was no part of the testator's intention that the male descendants *generally* of

'hillips Monypenny should take the estate, but only a ery small part of those descendants, namely, the eldest irect line tracing from each of his sons, and that eldest ne only.

To hold, therefore, that the sons took estates in tail male, ould be, not to effectuate a general at the sacrifice of a articular intention, but arbitrarily to force on the testator a intention different from that which he has expressed;— o conjecture what the testator would have done if he had een aware of the impossibility of carrying the estate in he course of descent which he has designated, and then to old that he has done what the Court supposes it probable e would in such circumstances have wished to do. The octrine of cy pres, if it be such as we have described it, nd such as it is stated to be by Mr. Butler, clearly does ot warrant any such decision; and what we have to do, herefore, is to see whether the decided cases, which have arried the doctrine the furthest, warrant the construction ontended for.

The case which is generally represented as having pushed he doctrine further than any other, is *Pitt* v. *Jackson* (*a*). There, Pinckney Wilkinson, having, under an antenuptial ettlement, a power of appointing amongst the children of he marriage lands to be purchased with certain trust-oonies comprised in the settlement, made his will pursuant o the power, and thereby directed a part of the trust funds o be applied in the purchase of real estate, to be settled to he use of his daughter Mary for her life, for her separate se, with remainder to trustees to preserve contingent remainders, and after her decease, to the use of all her children as tenants in common in tail, with remainder over. Inasmuch as Mary the daughter was of course not in esse at the time of the settlement, the attempt to give her a life estate, with remainder to her childrrn as tenants in common

(*a*) 2 Bro. C. C. 52.

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in tail, was an attempt to do what the law would not allow, as tending to a perpetuity. But Lord *Kenyon* held that the appointment was not void, but might be carried into effect cy pres, i. e. by holding that Mary the daughter took an estate tail.

The only ground on which this case can be explained is, that the Court divided the expressed intention into several parts, holding the words of the will to express the intention, first, that the daughter, and all who should be heirs of her body, should take before the estate should go over; secondly, that the daughter should have a life estate only; and thirdly, that her children, and the heirs of their bodies, should take in succession, not according to the ordinary rules of law, but that all the children of the daughter should take as tenants in common in tail; and the two latter intentions being illegal, the Court executed, or professed to execute, the testator's intentions as nearly as the rules of law would permit, by giving the estate to the daughter and the heirs of her body. It is very difficult really to treat this as carrying into effect any part of the testator's expressed intention; but the ground of decision must have been that it did so. In truth, the case can hardly be relied on as an authority; for, as is pointed out by Sir E. Sugden (*a*), the case afterwards came before Lord *Loughborough* on two bills of review, and he, though in words he assented to the doctrine of Lord *Kenyon*, yet in truth acted beside or even against it. It appears from the report of the case on the bills of review, *Smith* v. *Lord Camelford* (*b*), that the daughter under the settlement took an estate tail in default of appointment, and Lord *Loughborough* held that the appointment to her for life united with her estate tail under the settlement, the estates appointed after her life estate being void for remoteness, so that ultimately the daughter took an estate tail, without aid from or applica-

(*a*) 2 Powers, 64. (*b*) 2 Ves. jun. 698.

ion to the doctrine of cy pres. In a late case, however, before V. C. *Wigram*, *Vanderplant* v. *King* (*a*), that learned judge, though evidently not approving the doctrine of *Pitt* v. *Jackson*, yet seemed to think it a subsisting authority, and in fact acted on it as binding him in a case where the devise was in terms precisely similar. In considering how far these two cases are in point with reference to that now before us, it must be observed, that, both in *Pitt* v. *Jackson* and *Vanderplant* v. *King*, the persons who would from time to time take under the cy pres doctrine, would never include any one who was not an object of the testator's bounty. In both those cases the intention was, at all times and in all possible states of the family, to benefit heirs of the body who were the parties taking under the cy pres doctrine. The persons who should from time to time be heirs of the body, were intended to take in common with other lines, if other lines there were—alone, if there were no other lines. Moreover, the estate was not to go over so long as there was any one who would answer the description of heir of the body of the first taker, and in failure of all such persons it was to go over. This intention was effectuated by the cy pres doctrine.

In these particulars the present case, it will be observed, differs entirely from the two we have referred to. Here it never was the testator's intention, collecting that intention from the words he has used, to benefit any heir male of the body of any son of Phillips Monypenny, except those who should derive title through an eldest son; and the doctrine, therefore, which should give the estate to an heir male claiming through any other line, through a second son of Phillips Monypenny's eldest son for instance, would obviously give it to a line of persons whom the testator did not intend to benefit. And again, on failure of the eldest line of male descendants claiming through Phillips Mony-

(*a*) 3 Hare, 1.

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penny's eldest son, the intention was that the estate should go over to the next son of Phillips Monypenny; whereas the doctrine of cy pres would carry it to the heirs male of the body of Phillips Monypenny's eldest son, i. e. to his second son and his male descendants. These are certainly important distinctions between this case and *Pitt* v. *Jackson* and *Vanderplant* v. *King*; and without, therefore, meaning to say that the doctrine on which Lord *Kenyon* proceeded, and which V. C. *Wigram* felt himself bound to follow, is satisfactory to our minds, it is sufficient for us to say that those authorities are not precisely in point, and we do not feel inclined to carry the doctrine on which they rest one step further, which we should be doing, if we held that they governed the case now before us.

There is, however, another reported case of an earlier date, in which this same ground of distinction certainly does not exist. We allude to the case of *Nicholl* v. *Nicholl*(a). There the testator devised his real estates to the second son (unborn) of William Nicholl for his life, and after his death, or in case he should inherit the paternal estate, then to his second son and his heirs male, and for default of such issue to the third, fourth, and other sons of William Nicholl successively in tail male, and for default of such issue, to the first and other sons successively of J. Nicholl (who was unmarried) in tail male, with remainders over. Two questions arose: first, whether, until there should be a second son of William Nicholl, the estate went to the heir at law, or to the remainder-man; and secondly, what estate the second son of William Nicholl would take. The Court of Common Pleas, on a case sent by the Lord Chancellor, certified their opinion, first, that the heir at law and not the remainder-man took the estate till there should be a second son of William Nicholl; and secondly, that such second son, in order to effectuate the general intention, would take

(a) 2 W. Bl. 1159.

an estate in tail male, determinable on the accession of the paternal estate.

It is certainly very difficult to see how this construction had any tendency to carry into effect any general intention of the testator, collecting the intention from the words he had used. That intention would clearly never include, under any possible circumstances, any descendants of the second son of William Nicholl, except the second son of such second son, and the heirs male of his body, i. e. the heirs male of the body of the second son of the second son, not the heirs male of the body of the second son himself. Perhaps the Court, seeing that as to the third and all subsequent sons there was a clear expressed intention to give successive estates in tail male, might have felt itself warranted in inferring that, in spite of the language used by the testator, his intention must have been to secure the estate to *all* the male descendants of the second son, though with a superadded impossible intent, that the line of the second son should take in priority to the first, supposing the paternal estate to have descended on the second son of William Nicholl. However that may be, the case is certainly one which it is very difficult to explain on any principle of construction, which does not leave it to the Courts (where the testator has expressed an illegal intention) to reject what he has said, and make the estate to devolve, not in the course pointed out in the will, but in some other course, which, under the circumstances, may appear convenient and easy to be carried into effect.

We cannot agree with the observations of Mr. Butler, in the subsequent part of the same note we have already referred to, where, in speaking of this case of *Nicholl* v. *Nicholl*, together with the other cases prior to *Pitt* v. *Jackson*, he says, that in *all* those cases the ancestor taking an estate tail so far quadrated with the estate intended by the testator for the issue, that though the quality of the estate

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taken under the cy pres doctrine would be different from the quality of the estate they would have taken under the will, still it would not vary the course or order of the devolution of the land. That observation is applicable to all the cases except *Nicholl* v. *Nicholl*, but certainly not to that case. The decision there appears to us so unintelligible, that we cannot think ourselves bound by it, unless in a case precisely similar, which the case now before us is not.

Taking, then, the doctrine of cy pres to be such as it is from the passage we quoted from Mr. Butler's note, we do not think it can in any case properly be applied, so as to carry the estate in a line of succession different from that which the testator has directed. Whether we should, in a case precisely similar to *Nicholl* v. *Nicholl* or *Pitt* v. *Jackson* (followed, as the latter has been, by V. C. *Wigram*), feel ourselves bound to follow those decisions, is a matter which we are not now called on to decide. It is enough at present to say, that they do not seem to us in terms to apply to this case, in which, therefore, our certificate will be in conformity to what we consider to be the true doctrine, as stated by Mr. Butler.

To hold that the sons of Phillips Monypenny took estates in tail male, would be to hold that they took estates which would carry the property in a different course of succession from that indicated by the testator. This would be to go against the will, and not to carry its provisions or any part of its provisions into effect. The consequence is, that in our opinion the eldest son of Phillips Monypenny, if he had had a son, would have taken an estate for life only, and all the subsequent estates are void for remoteness.

Some stress was laid in the argument on the words giving the property over to Thomas Monypenny in default of *issue of my brother Phillips, or in case of his not leaving any at his decease.* It was contended that these latter

words, whatever the construction of the limitation to the children of Phillips Monypenny, made the devise to Thomas and his issue good, inasmuch as it was to take effect on an event which must happen within the allowed period of time, namely, at the death of Phillips Monypenny, if he should *then* leave no issue, which event happened. But, looking at the whole context, we think the real meaning of the words was only this, *on the death and failure of issue of my brother Phillips Monypenny*, whether that failure shall occur at his own death or afterwards, I devise to Thomas; and therefore, whether the word issue, there used, is to be construed to mean issue general, or *such issue* as had been previously designated, in either case the limitation over will be void, as being an attempt to create estates which were to commence at too remote a period, namely, the general failure of issue of Phillips Monypenny, or the failure of the particular issue mentioned by the testator. The limitation would not be set up by holding it to have given an estate tail by implication to Phillips Monypenny, for such an estate tail would be bad, as not being to commence till after the failure of the particular previous estates, which we have already stated are void for remoteness.

The consequence will be, that the gavelkind heirs are the parties entitled, and we shall send our certificate accordingly.

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Jan. 23.

Service of a writ of summons on a clerk in the office of the secretary of a corporation aggregate, is not sufficient service on the "clerk or secretary," under 2 Will. 4, c. 39, s. 13, so as to authorise a motion for a distringas, or to enter an appearance for the defendants.

WALTON *v.* The UNIVERSAL SALVAGE COMPANY.

G. *POLLOCK*, for the plaintiff, moved to enter appearance for the defendants, on an affidavit of service the writ of summons on a clerk in the office of their sec tary. The defendants were incorporated and complet registered according to law, and the secretary acknowled the fact of service. The direction of 2 Will. 4, c. 39, s. has been complied with.

PARKE, B.—That act, in directing service of process to made on a "clerk" to the corporation sued, means some pr cipal officer, not a clerk in its secretary's office. Whet there is any difference or not between the service direc by the expression "served" and personal service, this is service on the secretary or any principal clerk of company. Where service on an individual is injoined, distringas would be granted till every effort has been m to serve him personally; and the word "served," as h applied to corporations, has the same object, viz. perso service on a principal clerk or secretary.

ALDERSON, B.—If an act directs personal service o particular person, we should do wrong to admit equival in lieu of that service. Two more attempts must be m to serve the secretary personally, and if any infere should then reasonably arise that he does not choose t served, the plaintiff may move, not to enter an appeara but for a distringas.

The other Barons concurring,

Rule refuse

1847.

Jan. 26.

DUNN, Administrator, v. COX.

The subject's right to try a case by a special jury is not affected by any suggestion of the Attorney or Solicitor-general, without affidavit, that the Crown is interested in the defendant's estate, though that suggestion would be sufficient to obtain a trial at bar.

PASHLEY moved to discharge a rule for a special jury obtained by the defendant upon certain affidavits, and asked for the rule to be absolute in the first instance, having given notice to the other side. [The *Solicitor-General* stated, that the Crown had an interest in the defendant's estate.] [*Pollock*, C. B.—That suggestion of the *Solicitor-General* is sufficient to establish the fact without affidavit, for the Crown has a right to ask a trial at bar; but the general right of the subject to try a case by a special jury can only be touched by affidavit. It is not usual, however, to grant this rule absolute in the first instance as prayed, and cause may be shewn on the day after to morrow (*a*).]

(*a*) In the Queen's Bench, no rule is granted to discharge a special jury, but the rule is to shew cause, in two days, why the cause should not be tried in its order, notwithstanding the rule for a special jury: *Bush* v. *Pring*, 9 D. P. C. 180. In the result, the case is tried by a common jury, unless the defendant is able to obtain a special jury in time.

Jan. 26.

BRIDGEFORD v. WISEMAN and Others.

Judgment as in case of nonsuit may be moved for by one of several defendants, though other defendants have moved for costs of the day for not proceeding to trial.

ATHERTON, on the part of some of the defendants, had obtained a rule for payment of costs of the day for not proceeding to trial pursuant to notice. The record had been withdrawn at the assizes. The Master allowed the plaintiff's attorney for five days' attendance there, including the day on which the record was withdrawn. A rule was obtained to review his taxation, in order to disallow the costs of that day, when *Hugh Hill* shewed cause, and

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it was discharged with costs. A motion was afterwards made on behalf of another defendant for judgment as in case of a nonsuit. The Master hesitated to draw up the rule, as costs of the day had been already moved for in the cause.

But per PARKE, B.—That rule only applies where, after moving for the costs of the day, the same party moves for judgment as in case of a nonsuit (*a*).

Rule granted for judgment as in case of a nonsuit.

(*a*) See *Rhodes* v. *Thomas*, 2 Dowl. & L. 531.

Jan. 27.

RISHWORTH *v.* DAWES.

After leave given to amend the declaration upon payment of costs, the defendant did not serve a rule to plead several matters, or produce to the Master the draft pleas as meant to be amended, with 6*s.* 8*d.* costs for amendment. The plaintiff replied to the old pleas, and made up and delivered the issue, with notice of trial, though the defendant was not under terms to rejoin gratis. The delivery of the issue was set aside: but *held* that, as no production of the intended new pleas took place on taxing the costs of amendment, the defendant had no right to sign judgment of non pros.

A RULE had been obtained by *Flood*, for setting aside a judgment of non pros. On the 11th November pleas were delivered; on the 16th an order to amend the declaration was served on the defendant's attorney, who, on that occasion, told the plaintiff's attorney that the pleas would be different, and that he had better get a summons to tax the costs of amendment. The order to amend was drawn up upon payment of costs to be taxed. The costs were taxed on the 21st: the plaintiff's attorney did not attend the taxation pursuant to notice given on the 20th, but amended the declaration, and left it with 6*s.* 8*d.* at the office of the defendant's attorney. The plaintiff's attorney

en made up the issue, adding a replication to the old eas, and delivered it with notice of trial to the defendant's torney. On the 20th the defendant had been prepared plead, but did not, and did not serve the rule to plead veral matters. The issue and notice of trial were set ide on the 25th. No fresh step was taken till the 7th ecember, when the defendant's attorney demanded a plication to the old pleas, and afterwards signed judg-ent of non pros.

Charnock shewed for cause, that the defendant was not der terms to rejoin gratis, or bound to draw up the le to plead several matters till *after* payment of the sts of amendment. [*Alderson*, B.—Was it a condition the order to amend that costs should be paid (*a*)?]

Flood, contrà.—The amendment of the pleas must take ace, before it can be known what the pleadings are.

PARKE, B.—What was set aside was not the replication ntained in the issue, but the delivery of the issue. The lgment of non pros. was therefore wrong; no costs were be taxed unless the defendant pleaded de novo. The actice is to tax costs on production before the Master of e draft pleas as intended to be amended, with 6*s*. 8*d*. costs r amending. That production not having taken place, ere is no proof of any intention to plead several or fferent pleas. The rule must be absolute for setting ide the judgment of non pros., on payment of costs.

Rule absolute.

(a) If no such condition exists, d no undertaking by the attor-y to pay the costs, the order ght be abandoned by the par-obtaining it after the taxation of costs, they not being costs in the cause: *Pugh* v. *Kerr*, 5 M. & W. 164. See 6 M. & W. 17; 1 B. & C. 651; 2 N. R. 473.

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Jan. 28.

The use of words imputing an indictable offence is actionable or not according to the sense in which they may fairly be understood by bystanders not acquainted with the matter to which they relate, or which may render them a privileged communication, and the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial.

HANKINSON *v.* BILBY.

CASE. The declaration stated, that the plaintiff, before and at the committing of the grievances, was a gardener, and thereby acquired great gains, and earned his livelihood; and that the defendant, well knowing &c., on &c., in a discourse which he had of and concerning the plaintiff, and of and concerning him as such gardener, in the presence and hearing of divers subjects, then in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such gardener, the false, scandalous, malicious, and defamatory words following (that is to say):—"You (meaning the plaintiff) are a thief, and a bloody thief. You (meaning the plaintiff) get your (meaning the plaintiff's) living by it. You (meaning the plaintiff) have robbed Mr. Lake of £30, and would have robbed him of more, only you (meaning the plaintiff) were afraid. I (meaning himself, said defendant) did mean what I said; be off, I don't want any bloody thieves (meaning the plaintiff) here. You (meaning the plaintiff) know you (meaning the plaintiff) robbed Mr. Lake of £30." By means of the speaking and publishing which words divers persons have believed the plaintiff to be a person guilty of the offences and misconduct imputed to him, &c. Pleas, not guilty; and other pleas which became immaterial. At the trial, before *Rolfe*, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the Kingsland turnpike-gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury, that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the bystanders would understand the

charge to be conveyed by them. Verdict for the plaintiff for £5.

Humfrey now moved for a new trial, on the ground of misdirection. No special damage being laid, it was necessary to shew the words to be actionable in themselves. The witness called by the plaintiff to prove the words was purposely selected, he not having heard the previous conversation between the plaintiff and defendant. Mr. Starkie, in his work on Libel (*a*), says, "It is incumbent on the party who complains that he has suffered from an imputation of crime, to shew with certainty the injurious nature of the communication. In order to establish this point, two circumstances are necessary: first, that the words or signs used should, either of themselves or by reference to circumstances, be capable of the offensive meaning attributed to them; secondly, that the defendant did in fact use them in that sense." He afterwards says (*b*), "It is now the settled rule of law that judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the whole circumstances of the case." [*Parke*, B.—The drift of Mr. Starkie's remarks is to shew, that the effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable or not: that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them (*c*). A man must be taken to mean what he utters. If he use words imputing felony, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant on request, making a charge to a constable, &c. My brother *Rolfe* thought that the question was, what was the effect on the bystanders of the words used, not what

(*a*) 2nd Edit., Vol. 1, p. 44.
(*b*) Id., p. 46.
(*c*) See per *Holt*, C. J., *Somers* v. *House*, Holt's R. 39.

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the defendant secretly intended in his own mind.] In *Tempest* v. *Chambers* (*a*), the declaration alleged that the defendant had charged the plaintiff before a magistrate with having *feloniously* taken away the defendant's shutters. The written information was for unlawfully taking them and converting them to his own use, viz. a mere trespass. The defendant having got the warrant, said to the plaintiff's agent, "I have got a warrant for Tempest. I will advertise a reward to apprehend him. I shall transport him for felony." Lord *Ellenborough* said, "The case is reduced to the speaking the words. The defendant probably thought that, as he had obtained a warrant, the plaintiff had been guilty of felony. The warrant was improperly granted. This is different from the case of words spoken without explanation to a stranger, since they were spoken to one who had been employed as the plaintiff's agent, and arose out of the situation of the parties. He put his own sense on the warrant; I do not think he meant more. If you are of opinion that he meant substantively to impute a charge of felony, the plaintiff will be entitled to a verdict, but not otherwise." [*Alderson*, B.—In that case, had there been bystanders parties to or hearers of the conversation, who did not know the whole of the matter to which the words referred, as the witness, from his connection with the plaintiff, did, the intent of the defendant in using the words would have been material. In this case, had there been no bystanders who could understand the words as imputing felony, or who knew all about the affair respecting which they were uttered, the judge's direction would have been wrong, for it would then be damnum absque injuriâ, the injuria being the having no lawful occasion to impute felony. *Parke*, B.—The witness appears to have been well acquainted with the affair to which the words related. If the bystanders were equally cognizant of it, the defend-

(*a*) 1 Stark. N. P. C. 67.

ant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if bystanders may fairly understand them in a sense and manner injurious to the party to whom they relate, e. g. that he was a felon. Here no occasion appears for uttering the words at all, so that the defendant is altogether a wrong-doer. But had he, in his defence, shewed a lawful occasion to speak the words he did, then his private intention in uttering them might be material. For if the communication was privileged, his motive in making it would appear. *Alderson*, B.—[In order to make a communication privileged, the occasion must justify the uttering of actionable words.]

Some doubt being suggested as to the facts proved, the Court conferred with *Rolfe*, B.; and the next day,

POLLOCK, C. B., said—We find from my brother *Rolfe*, that there were several bystanders who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.

Rule refused.

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Jan. 28.

YOUNG and JOHN ATKINSON, Assignees, &c., *v.* WALKER, Sheriff of Yorkshire, and OGDEN (*a*).

An attorney's bill may be referred for taxation under 6 & 7 Vict. c. 73, s. 37, though not signed by him, or inclosed in a letter signed by him and referring to it.

Where, by consent of parties, a verdict is taken for a sum named for damages, and also all costs to which plaintiff had been put relating to the subject-matter of the cause, as between attorney and client, without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxation in a liberal way, and not by the ordinary rule.

THIS cause stood for trial at the Yorkshire Summer Assizes, 1846, but was withdrawn on the terms of the defendants paying £2000 damages, and all costs, without taxation. The following was the consent signed by the attornies on both sides:—

"17th July, 1846. We consent to a judge's order to stay proceedings on payment, on the first day of next term, of £2000 for damages, and also all costs which the plaintiffs may have been put to, whether in the action or otherwise, relating to the subject-matter of the cause as between attorney and client, and that without being subject to any taxation whatever, with the usual terms in default of payment."

The following order was afterwards drawn up on the 20th of July, and signed by the judge at Chambers:—

Young and Another, Assignees, &c. *v.* Walker and Another.

Upon hearing the attornies or agents on both sides, and by consent, I do order that further proceedings in this cause be stayed; but in case default be made in payment of £2000 for damages due from the defendants to the plaintiffs, for which this action is brought, and also all costs which the plaintiffs may have been put to, whether in the action or otherwise, relating to the subject-matter of the cause, as between attorney and client, on the 2nd day of November next, (no taxation to be necessary), the plaintiffs shall be at liberty to sign final judgment and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, sheriff's poundage, officers'

(*a*) A plaintiff named in a fi. fa. directed to the sheriff.

fees, and all other incidental expenses, whether by fieri facias or capias ad satisfaciendum."

On the 31st of October, the plaintiffs' attorney delivered an unsigned bill to the defendants' attorney, who, on the 2nd of November, called on him at Bradford in Yorkshire, and asked for time till the 1st of December to pay part of the damages and costs. On the 3rd of November, the plaintiffs' attorney heard from his London agents, that the defendants' agents had taken out a summons for taxing the bill of the plaintiffs' attorney, but that the order was refused. On the 9th of November, the defendants' attorney paid the plaintiffs' attorney £2000 damages, and 293*l.* 17*s.* 9*d.* costs, at the same time protesting in writing against the amount of his bill as delivered.

Willes, on the part of Samuel Atkinson (*a*), obtained a rule to tax the bill on the most liberal scale, but not as between attorney and client. The plaintiffs' attorney deposed, that no costs taxed according to the scale settled by the Master would pay his heavy expenses in sifting a fraud between the bankrupt and the defendant Ogden.

Knowles and *Tomlinson* shewed cause.—The bill in question was not delivered one month before action brought, or signed by the attorney, so as to be within 6 & 7 Vict. c. 73, s. 37. [*Parke*, B.—In *Re Pender* (*b*), the Lord Chancellor held, as the Master of the Rolls had done, that a bill of costs delivered may be referred for taxation, though not signed by the solicitor, or inclosed in a letter signed by him and referring to it. It was there thought that "such bill" in sect. 37 is not confined to a "*signed* bill," but extends to

(*a*) Samuel Atkinson was a sheriff's officer, who was not a party to the cause, or liable to the plaintiffs, though he had paid the damages and costs under his agreement to indemnify the sheriff for seizing under the fi. fa. Samuel Atkinson had not protested against the costs.

(*b*) 8 Beav. 299.

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the bill containing the attorney's demand. [*Alderson*, B. —The attorney's duty is to deliver a signed bill, and if he neglects to sign the bill he delivers, it is difficult to see how he can by that default exempt his bill from taxation.] Sect. 43 provides, that all applications made under that act to refer an attorney's bill to be taxed and settled, "shall be made in the matter of such attorney or solicitor." Now here the affidavits and rule are intitled *Young, &c.*, v. *Walker and Another*. [*Alderson*, B.—Supposing the affidavits were properly intitled, it is only by looking at them we are informed that the bill is not of the ordinary kind. *Platt*, B., alluded to *Anderson* v. *Ell* (*a*). *Parke*, B.—If we have power at all, it is in the cause, so the objection to the intitling the affidavit is at an end; but there may be another objection on the merits. The application is to tax a bill which the client has undertaken to pay without taxing. That agreement is in truth to pay a *fair* bill. Have we any power to tax a bill against an express agreement not to tax it? The Master must tax by the ordinary rules; but this bill should be taxed by some fair and competent attorney, who would see that charges, if extravagant, were not enforced. *Pollock*, C. B.—An agreement to pay a future bill, without taxation, means a reasonable bill; and if an extravagant bill is sent in, the Court, irrespective of the statute, has power to order it to be taxed. This application is not to tax the bill, but to see that it does not exceed the amount at which it might have been taxed in a liberal way. A party paying money under protest is not to be considered as having paid it all. *Parke*, B.—If a man chooses to enter into such agreement, he cannot tax the bill under the statute. If there is any right to tax it, it must arise from something which grows out of the cause.]

Rule discharged without costs, on counsel's consent to refer it to the Master on liberal terms.

(*a*) 3 D. P. C. 73.

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Jan. 30.

FESENMAYER v. ADCOCK.

An I. O. U. is evidence of an account stated between the holder and the party signing it, but not of money lent to him by the holder.

UMPSIT for work and labour as an attorney, with for money lent, money paid, and on an account The particulars of demand were, inter alia, for lent, but stated that the plaintiff sought to recover veral sums of money specified on each and every of the declaration. Pleas, non assumpsit, and a set-off. trial, the plaintiff went for £32 for his bill of costs, r cash lent, and 13*l.* 10*s.* for money paid to a third on the defendant's account. To prove the count for lent, the plaintiff offered in evidence an I. O. U. for lated the 12th of October, 1844, signed by the de- t, but not addressed to the plaintiff. *Rolfe*, B., held was neither evidence of money lent by the plaintiff defendant, nor of any account stated between them. t for the defendant.

tson now moved for a new trial, on the ground of ection, citing *Curtis* v. *Rickards* (*a*), and *Douglas lme* (*b*). The learned Baron should have left the J. to the jury as evidence that an account had been between the parties, as it may have been handed or that express object. If the defendant wished to that it had been in the hands of a party other than laintiff, so as to be a negotiable instrument, which to have been stamped, it was for him to prove it.

LLOCK, C. B.—Many cases shew, that an apparent ger to an instrument may be so far connected with it e fact of producing it, as to make it evidence for a

(*a*) 1 Man. & Gr. 46. See 2 M. & W. 20.
(*b*) 12 Ad. & E. 641.

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jury in support of his claim. Nor is this plaintiff confined by the particulars to any particular count (*a*).

PARKE, B.—An I. O. U. is no more proof of money lent by the party holding it to the party sought to be charged by it, than of goods sold and delivered by one to the other. And unless it is evidence of an account having been stated between them, it proves nothing at all. In *Curtis* v. *Rickards*, the production by the plaintiff of the I. O. U. was held primâ facie evidence that an account had been stated by the defendant with him, though no name was mentioned on the instrument. I agree with that decision.

ALDERSON, B.—Primâ facie the U. means the person producing the memorandum. The case turns on the construction of the letter U. I am clearly of opinion that this instrument is not evidence of money lent by the plaintiff to the defendant, and it may be well that our opinion should be expressed on that point, in order to prevent any contrary impression from *Douglas* v. *Holme*.

ROLFE, B., concurred.

Rule accordingly (*b*).

(*a*) See *Sidaways* v. *Todd*, 2 Stark. N. P. C. 402; and 4 Esp. 7.

(*b*) This rule was made absolute in Trinity Term, on the ground now stated by the Court.

1847.
Feb. 1.

ARDOE, Surviving Executor of L. M. KINNERSLEY, Executrix of J. KINNERSLEY, *v.* PRICE, Clerk to the Trustees under a Turnpike Act, 5 Vict.

By a local turnpike act, the trustees were to apply all monies received by them by virtue of the act, upon the roads included in the act: 1st, in paying the expenses of and incident to the obtaining of the act; 2ndly, in paying and discharging any interest which might, from time to time, be owing in respect of money which might have been borrowed on credit of the tolls authorised to be taken by former acts, thereby repealed; 3rdly, in keeping the roads in repair; 4thly, in paying and discharging any interest on money which might thereafter be borrowed on the credit of the tolls; 5thly, in reducing and discharging the principal monies borrowed on the credit of the tolls authorised to be taken by the former acts; and, lastly, in reducing and discharging the principal monies which should thereafter be borrowed, &c.

Held, that a mortgagee of the tolls authorised to be taken by the former acts, had not a right of action against the trustees for money had and received, for the arrears of interest due to him, although it appeared that the expenses of obtaining the act had been paid, and that the trustees had in their hands sufficient money for the payment of such arrears of interest.

DEBT. The first count of the declaration was for money received by the said trustees for the use of the plaintiff, as the personal representative of James Kinnersley; and the second count was for money due on an account stated by the trustees with the plaintiff as executor. The particulars of demand stated the action to be brought to recover the sum of £430, being arrears of interest at £5 per cent per annum, from the 1st of January, 1805, on £200 lent by the said James Kinnersley to the trustees of the Kington turnpike trust, prior to 1802; and that the plaintiff also claimed the same sum as the amount of tolls received by the trustees, and applicable to the payment of arrears of interest due to the plaintiff, as representative of James Kinnersley, and also on an account stated.

The defendant pleaded the general issue, and the Statute of Limitations, which the plaintiff traversed, and issues were joined thereon. The cause came on to be tried before Lord *Denman*, C. J., at the Summer Assizes for Hereford, in 1845, and a verdict was found for the plaintiff for £430 and costs, subject to the opinion of the Court upon the following case:—

By the act of parliament of the 5 Vict., which came into operation on the 11th of July, 1842, it is enacted, that all monies which shall be received by the said trustees, by virtue of this act, upon the roads included in this act, shall be applied as follows, that is to say, first, in paying and discharging the expenses of obtaining and passing this act, and incident thereto; secondly, in paying and discharging

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any interest which may from time to time be owing in respect of any money which may have been borrowed on credit of the tolls authorised to be taken by the said former acts hereby repealed; thirdly, in paying the expenses of improving, maintaining, and keeping in repair such roads, and in putting this act into execution with reference thereto; fourthly, in paying and discharging any interest on money which may hereafter be borrowed on the credit of the tolls to be taken on the said roads; fifthly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls authorised to be taken by the said former acts hereby repealed; and lastly, in reducing, paying off, and discharging all principal sums of money which may hereafter be borrowed, and which shall be due and owing on the credit of the tolls to be taken on the said roads.

The plaintiff, on the trial of the cause, put in a special case stated in a former action between the same parties, a copy of which, signed by the respective attornies, is annexed to the present case (*a*); and further proved, that the annual statements of accounts produced from the office of the clerk of the peace, mentioned therein, were forwarded to the clerk of the peace by the clerk of the trustees, pnrsuant to the statute, and also those for the years 1842 and 1843, and were deposited by the said trustees pursuant to the said statute; and it appeared from those accounts, that the expenses of obtaining and passing the first-mentioned act amounted to 395*l.* 18*s.* 8*d.*, and were paid before the commencement of this suit.

The case for the plaintiff having closed, the defendant's counsel contended that the plaintiff must be nonsuited; but, at the suggestion of the learned Judge, a verdict was taken for the plaintiff for the full amount, subject to the opinion of this Court, whether that verdict should stand for any, and if for any, for what amount, or whether a nonsuit

(*a*) See it stated, 13 M. & W. 267.

should be entered. The defendant was not to object to the admissibility of any evidence given upon the present trial, but all other points were to be open to him.

The question for the opinion of the Court is, whether the verdict as entered ought to stand for any and what amount, or whether the plaintiff ought to have been nonsuited, or a verdict entered for the defendant, in which case a nonsuit or verdict is to be entered; and the Court is to be at liberty to draw any inference from the facts that a jury might draw. The record is to be referred to, and taken as part of the case.

The plaintiff's main point of argument was, that the objection to his right of action, which was held fatal in the argument in the former special case, was removed by the subsequent statute, which specifically appropriated all monies received by the trustees, first, to the expenses of the act, secondly, to the arrears of interest on money previously borrowed. The defendant's point was, that an action for money had and received could not be maintained, and that the plaintiff ought to have declared specially.

The case was argued in Trinity Term, 1846 (May 27), by

Smythies, for the plaintiff.—The present case is quite different from that which was before decided between these parties. That decision proceeded upon the ground that the then existing turnpike acts did not impose upon the trustees any *duty* to pay interest to the mortgagees of the tolls, and that no monies had been shewn to have been specially appropriated by them to the payment of such interest: and it is in truth an authority for the plaintiff, under the present circumstances of the case; for the new act of 5 Vict. expressly provides for and directs the appropriation of all the monies raised by means of the tolls, in the first place in paying the expenses of obtaining the act, which

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were shewn to have been paid, and then in payment of any interest which may from time to time be owing in respect of money borrowed on the credit of the tolls authorised to be taken by the former acts. And these words are amply large enough to include past as well as future arrears of interest. *Atty* v. *Parish* (*a*) and *Edwards* v. *Bates* (*b*) may be cited for the defendant, but the doctrine laid down in those cases is not applicable here. Here the statute in express terms directs payment to be made to the class of persons of whom the plaintiff is one; and wherever that is the case, the party has a right to recover in an action of debt founded upon the right given him by the statute: *Carden* v. *The General Cemetery Company* (*c*), *Tilson* v. *The Warwick Gas Light Company* (*d*). He referred also to *Doe* d. *Bancks* v. *Booth* (*e*), *Mellish* v. *Brooks* (*f*), *Spong* v. *Wright* (*g*), and *Reg.* v. *The Hull & Selby Railway Company* (*h*), and argued, in the second place, that by the accounts signed on the part of the trustees, since the passing of the new act, they had admitted that all the money received by them, after payment of the expenses of the act, was applicable to the payment of the interest due to the creditors under the former acts.

Keating, for the defendant.—This action is in truth a compendious mode of recovering, as money had and received, any extent of interest due upon a specialty. The former case of *Pardoe* v. *Price* is by no means any authority for the defendant in this action. The Court nowhere said, that, if the act of Parliament *had* contained words directing the trustees to apply any part of the money in their hands to

(*a*) 1 N. R. 104.
(*b*) 8 Scott, N. R., 434; 2 Dowl. & L. 299.
(*c*) 5 Bing. N. C. 253.
(*d*) 4 B. & C. 962.
(*e*) 2 Bos. & P. 219.
(*f*) 3 Beav. 22.
(*g*) 9 M. & W. 629.
(*h*) 6 Q. B. 70.

ayment of interest, an action for money had and
ed would therefore have been maintainable against
If this form of action be allowed, how is the de-
it to plead the Statute of Limitations, 3 & 4 Will. 4,
There is nothing on this record that would fit a
f the Statute of Limitations on the specialty. The
aken by *Cresswell*, J., in *Edwards* v. *Bates*, of *Atty*
rish, and the other similar cases, gets rid of these
lties. With respect to *Doe* d. *Bancks* v. *Booth*, the
udicial doctrine of Lord *Eldon* in that case was
d to by the Court on the former argument of this
nd qualified in terms. It was the dictum of an equity
applying equitable principles to a common law action.
plaintiff has any right, he ought to have declared
ly, as in *Cane* v. *Chapman* (*a*), setting forth the
ible obligation, and shewing how the duty to pay
ney to him arose. For no such duty is created by
tute alone: the only duty arising out of it is to pay
ecialty creditors, according to the specialties. The
o pay to any particular creditor must be compounded
statutory obligation and the specialty contract. It
e contended on the other side, that money had and
d would lie against the trustees by an attorney for
l, or by a person who had done repairs to the roads.
laintiff must say that every person who may be
under any of the contingencies mentioned in the
section, may maintain money had and received, on
g the state of facts.
th respect to the accounts, they carry the case no
r; they admit no more than that the trustees have
in their hands applicable to the payment of the
lty debts generally.

ythies, in reply.—The principle of law upon which

(*a*) 5 Ad. & E. 647.

Parliament to be first satisfied. That being so,
has arisen to pay the interest to all and each of the
It is said the parties who have done repairs to
may equally sue, if the plaintiff can; but that is n
they are not persons ascertained and contemplated b
as creditors to be paid. It is a mere authority to th
to expend money on the roads, before payment of t
pal money to the mortgagees.

Cur. ad

The judgment of the Court was now delivered

Rolfe, B.—This was an action brought to reco
of £430, being forty-three years' arrears of inter
per cent. on a sum of £200, lent by the plaintiffs
prior to January, 1802, to the trustees of the
Turnpike Road, and secured by a mortgage of
The facts are the same as those which occur
case in this Court between the same parties, a
is reported in the 13th volume of Meeson &
page 267. That action, which was commence
27th June, 1842, was an action of debt for m
and received by the defendants, as trustees of th
question. It was proved at the trial of that cause
trustees had constantly been in the receipt of tl
question; but we were of opinion that the mon
ceived by them was not money had and receiv

there was no legal obligation on them to apply that surplus in payment of the interest. We were, therefore, of opinion that, though the plaintiff, as personal representative of one of the mortgagees, might have a right to call on the trustees to account in a court of equity, yet he had no right, in a court of law, to treat the money received by the trustees for tolls as money had and received to his use; and for that reason, and without going into any other question, the defendants had judgment in that action.

The present action was commenced in the month of February, 1845. It is an action of debt, brought by the plaintiff, as personal representative of James Kinnersley, against the defendant, as clerk of the turnpike trustees, for money had and received to the use of the plaintiff; and the particulars of demand state the action to be brought to recover forty-three years of arrears of interest, at £5 per cent. from the 1st of January, 1802, on a sum of £200, lent by Kinnersley to the trustees. The defendant pleaded, first, that he never was indebted, and secondly, the Statute of Limitations. The plaintiff sought to distinguish this case from the former, principally by reason of an act of Parliament, 5 & 6 Vict. c. xxvii, intituled, "An act for repairing and maintaining several roads leading from the town of Kington, and other roads branching therefrom, in the county of Hereford," which received the royal assent on the 18th June, 1842, a few days before the commencement of the former action, but which was not relied on or cited in the argument of that case, nor indeed were the provisions applicable to the then state of circumstances. It begins by repealing the former acts, and appoints new trustees, and makes new provisions for the levying of tolls, and the repair of the roads; and then, in section 19, enacts, that all monies which shall be received by the trustees, by virtue of that act, shall be applied as follows: i. e., 1st, in discharging the expenses of obtaining the act; 2ndly, in paying and discharging any interest which may from time to time be owing

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in respect of any money which may have been borrowed on the credit of the tolls authorised to be taken by the former acts; 3rdly, in paying the expenses of keeping the roads in repair; 4thly, in paying the interest of money thereafter to be borrowed on credit of the tolls; 5thly, in discharging the principal sums borrowed under the former acts; and lastly, in discharging the principal sums thereafter to be borrowed.

At the trial of the second case, at the Hereford Spring Assizes of 1845, the plaintiff proved the same facts as had been proved in the former case, and he also proved the accounts of the trustees for the years 1842, 1843, and 1844, signed by the chairman, and by the defendant as clerk, setting forth the receipts and expenditure for those years, and shewing that the amount of tolls received by the trustees was more than sufficient to satisfy all arrears of interest due to the several mortgagees, after satisfying the law expenses, which expenses, including the expense of obtaining the act, were proved to have been paid.

The plaintiff contended, that, as all the costs of obtaining the act were proved to have been paid, the trustees were, by the express terms of the act, bound to pay over the money in their hands, in the first place, in discharging the interest due to the plaintiff and the other creditors under the former acts; and consequently, that, as the trustees had certainly received more than sufficient to discharge those arrears, the sums so received were to be treated as money had and received by them to the use of the plaintiff and the other creditors entitled to the interest. It is quite clear that, so long as no other relation subsists between two parties except that of trustee and cestui que trust, no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such a case, the only person entitled at law to the money, and the remedy of the cestui que trust is exclusively in a court of equity. When, indeed, there is no trust to execute, except that of paying over money to the cestui que trust, the trustee, by his con-

duct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the cestui que trust, for money had and received, or for money due on account stated. Such was the case of *Roper* v. *Holland* (*a*), and there are many others to the same effect. But so long as there is no liability except as trustee, the cestui que trust has no legal remedy. A contrary doctrine might often deprive the trustee of many grounds of defence which would be available to him in equity; equitable set-off, for instance, or other equitable claims against the cestui que trust, which in good conscience ought to be available to him, and would be so in a court of equity, but which would afford no legal defence.

We acted on this principle in the recent case of *Bartlett* v. *Dimond* (*b*), and we see no reason to doubt the soundness of that decision. The question, therefore, is, first, in what character did the trustees receive the tolls, whether as trustees or as agents for the creditors; and if as trustees, then, secondly, have they done anything which can give their cestui que trust legal right against them? Now, on looking to the act, it appears quite clear that all the tolls were received by these trustees, in their character of trustees, and in that character only. The 19th section, which directs the application of the tolls, describes the persons receiving them as trustees. It then proceeds to point out the mode in which the money coming to the hands of the trustees is to be applied; i. e., 1st, in defraying the expenses of the act, and incident thereto; 2ndly, in keeping down the interest of the old debt; and 3rdly, in keeping the roads in repair. Now the money coming to their hands, applicable to the third purpose, must clearly come to them merely as trustees. It would be absurd to argue that any person employed in the repair of the roads could have a legal

(*a*) 3 Ad. & Ell. 99. (*b*) 14 M. & W. 49.

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remedy, not against the persons employing him, i of his employment, but under the statute against the as persons who had received the tolls. And if tl coming to the hands of the trustees, applicable the purposes pointed out by the act, (namely, the the roads), must necessarily be money in their han as trustees, and subject to no legal claim against also must the money applicable to all the other pu the act. For there is obviously no intention in t make any distinction in the different portions of th to the character in which the trustees are to hold t they are mere trustees (as they certainly are) of p tolls, they are mere trustees of the whole.

This case is distinguishable from the two cases v. *Warwick Gas Company* (*a*), and *Carden* v. *Gene tery Company* (*b*), where, under the acts of Parli which the defendants in those cases were inco the Court held that the solicitor employed in obta respective acts had a legal claim against the compa porated by the act. In each of those acts, there wa that the costs of obtaining the act should be paid, ence to all other claims, out of the first money re the defendants; and the Court of King's Bench in case, and the Court of Common Pleas in the other, c that the meaning of the legislature was to make porated companies (as soon as they had obtain debtors to the solicitors who had obtained the act, i costs which they had incurred. The defendants in th were in no sense *trustees* of any money coming to th They were the persons for whose proper benefit the had obtained the act; and the real meaning of the l was, to treat them, retrospectively, as having emp solicitors to procure their incorporation. We do n der those cases as at all governing that now befor

(*a*) 4 B. & C. 962. (*b*) 5 Bing. N. C. 2

on the general ground, therefore, to which we have already adverted, namely, that no action for money had and received is maintainable where there is no relation between two parties except that of trustee and cestui que trust, we are of opinion that this act of Parliament does not warrant the present action against the trustees, for any part of the money coming to their hands. It only remains to consider whether the trustees have, by their conduct, in any manner altered the mere relation of trustee and cestui que trust subsisting between them, and so rendered themselves liable, in respect of the money in their hands, to an action at law at the suit of the parties entitled to interest on the old debt.

The only mode in which it has been suggested that they have done so, is that they have, by their chairman and clerk, signed accounts since the passing the last act, whereby they have admitted that the expenses of obtaining the act have been paid, and so, by necessary inference, have admitted that the money subsequently received by them is money applicable to the payment of the interest due to the creditors under the former acts. But the argument is founded on fallacy. The trustees may, by the accounts in question, be taken to have admitted that they have paid certain sums for law charges; and the jury find that these sums include the expenses of obtaining the act. But, in the first place, the jury is not the proper tribunal for ascertaining that point; and even if they were, still, giving to the admission its very utmost force, it can amount to no more than an acknowledgment that the prior trusts have been satisfied, and so that the trustees have funds for executing the trusts under the second and subsequent heads mentioned in s. 19. This does not alter the character of the funds, and is not enough to give any legal remedy to the cestui que trust.

On these grounds we are of opinion that the plaintiff has

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failed to establish any legal demand, and so there must be judgment for the defendant.

It may be proper for us to add, that the decision of this case turns entirely on the act of Parliament, and we are therefore not called on to discuss the doctrine laid down by Lord *Eldon* in *Doe* v. *Booth*, or to consider to what case his dictum would apply. Probably, if it should ever become necessary to decide the point, it may be found, that in order to enable the mortgagee of tolls to maintain an action for money had and received against the trustees, it will be essential to shew something more than the mere relation of mortgagor and mortgagee. But as to this we give no opinion.

Judgment for the defendant.

Feb. 1.

Ex parte LORD.

The Court will not discharge from custody a bankrupt committed under the 6 Geo. 4, c. 16, s. 36, for not answering questions to the satisfaction of the commissioner, where they are of opinion that the story contained in his answers is not such as to satisfy a reasonable person of its truth.

The warrant of commitment of a bankrupt, under 6 Geo. 4, c. 16, s. 36, set out the whole of the bankrupt's examination respecting a sum of money which was not forthcoming, and which the bankrupt alleged to have been stolen from him by house-breakers; it then proceeded—"which answers are not, *nor are any of them*, satisfactory to me the said commissioner:"—*Held* sufficient, although some of the answers might, on the face of them, be satisfactory; for that the bankrupt was committed on account of answers which, taken as a whole, were unsatisfactory.

The warrant directed the committal of the bankrupt until he should full answer make, &c. "to the questions so put to him by me as aforesaid:"—*Held* good, although the words of the statute are—"until he shall full answer make to their satisfaction, to such questions as *shall be* put to him."

The warrant was directed "to the messenger of the said Court, and to his assistants, and to the governor or keeper of her Majesty's gaol of the Castle of York:—*Held* sufficient, without naming the messenger.

BRAMWELL moved for a habeas corpus, to be directed to the governor of York Castle, commanding him to bring up the body of Joseph Lord, a bankrupt, who had been committed to that prison by the warrant of the Commissioner in Bankruptcy for the Leeds district, for not answering satisfactorily certain questions put to him by

he Commissioner. The warrant of commitment was as ollows:—

"In the Court of Bankruptcy for the Leeds District.

"At the Town Hall, in Sheffield, in the county of York, this 7th day of August, 1846.

"Whereas a fiat in bankruptcy, bearing date the 27th ay of June, 1846, and directed to her Majesty's Court of Bankruptcy for the Leeds district, was duly awarded and ssued against Joseph Lord, of Sheffield, in the county of York, tanner and leather currier, and boot and shoe maker, lealer and chapman; and the said Joseph Lord had been luly adjudged bankrupt thereunder: And whereas the aid Joseph Lord did, on the 7th day of August, 1846, in bedience to a summons issued by me, Martin John West, ne of the commissioners of the said court, authorised to ct in the prosecution of the said fiat, directed to the said Joseph Lord, appear before me, Martin John West, the aid commissioner, at the Town Hall in Sheffield aforesaid, o be examined by virtue of the said fiat, and the statutes n such case made and provided; and I, the said Martin John West, the said commissioner, in execution of the aid fiat, and the powers and authorities given to me by the everal statutes made and now in force concerning bankupts, did, on the said 7th day of August, 1846, proceed to xamine the said Joseph Lord touching divers matters elating to his trade, dealings, and estate; and the said Joseph Lord having then and there, in open court before me the said commissioner, duly made, signed, and subscribed he declaration required by law to be duly made, signed, nd subscribed by bankrupts in lieu of an oath; I, the said commissioner, did then and there cause the several questions hereafter enumerated and set forth, to be put to him the aid Joseph Lord, before me the said commissioner, to which questions so put as aforesaid, the said Joseph Lord

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refused to give any other than the several answers immediately following (that is to say):"—[The warrant then proceeded to set forth a series of questions to and answers by the bankrupt, relating to a sum of money which the bankrupt admitted to have been in his possession a short period before the bankruptcy, but gave an account of its having been stolen by robbers, who broke into his house.—It then proceeded:] "Which answers of the said Joseph Lord are not, *nor are any of them,* satisfactory to me the said commissioner:" it then directed the officer to convey the bankrupt to the gaol of the castle of York, and the gaoler to detain him there, "until such time as he shall submit himself to me the said commissioner, or to any other commissioner of the said court, duly authorised to act in the prosecution of the said fiat, and full answer make to my or his satisfaction, to the questions *so put to him by me as aforesaid.*"

The warrant was directed "To the messenger of the said court, and to his assistants, and to the governor or keeper of her Majesty's Gaol of the castle of York, in the county of York."

A similar application had been made to *Erle,* J., in the Bail Court, and refused.

Bramwell, in support of the motion.—This warrant of commitment is defective both in substance and in form. First, it is defective in substance, for the commissioner had no power to commit at all under the circumstances set forth in it. The power of commitment is given to commissioners in bankruptcy by the stat. 6 Geo. 4, c. 16, s. 36, which enacts, that "it shall be lawful for them to examine such bankrupt upon oath, &c. touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answer into writing, which examination, so reduced into

writing, the said bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said commissioners touching any of the matters aforesaid, *or shall not fully answer to the satisfaction of the said commissioners any such questions*, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), it shall be lawful for the said commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to *the said* commissioners, to be sworn and full answers make to their satisfaction to such questions as *shall be* put to him, and sign and subscribe such examination." Now, in the present case, there is not on the face of the examination any equivocation or refusal to answer. The bankrupt has answered all the questions fully. His account is, that thieves broke into his house and stole the money, with respect to which the questions were put to him. It may be that the story he has told is an improbable one; but if it be consistent, and not so violently opposed to probability as to shock common sense, the commissioner, although he may have doubts as to the truth of it, is not authorised to commit. If the bankrupt answers fully, the commissioner ought to be satisfied. The *fulness* of the answer is the test. [*Alderson*, B.—You say a consistent falsehood is to satisfy the commissioner?] Yes, otherwise the result may be, that the bankrupt is to be imprisoned until he either commits perjury or says he has done so. [*Alderson*, B.—Is not the criterion whether a reasonable man would believe the story told by him?] The commissioner should not *commit* in such a case: the bankrupt may be indicted for perjury, if in fact it be false. An improbable circumstance *may* no doubt happen to a man, and so he may lie in prison all his life merely for telling the truth, unless he perjures himself to get out. [*Parke*, B.

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—The rule of law is clear; it is laid down by Lord *Kenyon*, in *Ex parte Nowlan* (*a*), that the question in each particular case to be decided is, "whether the answer given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person." In the same case *Ashhurst*, J., says, "It would be a ridiculous ceremony for the commissioners to go through, in examining a bankrupt, if they were bound to give credit to his account, however improbable or absurd it might be, merely because he has the effrontery to swear to it. In these cases they are to exercise their judgment upon the whole." We are to do the same. If we think the commissioner exercised a sound discretion in disbelieving the bankrupt's story, we ought to leave him where he is.] If such be the construction of the act of Parliament, great hardship may be imposed upon the bankrupt. He is only to remain in prison until he answers the questions *fully*. [*Parke*, B.—If you are right, he has only to answer the first question with a downright falsehood. *Alderson*, B.—He must satisfy some reasonable person that his story is probable. That is no very great hardship.] Every man who has the misfortune to have an improbable thing happen to him may then be imprisoned for an indefinite time, merely for telling the truth. [*Pollock*, C. B.—That is an observation which applies to the policy of the act of Parliament, and ought to be addressed to the legislature. The bankrupt acts have always received the construction stated by my brother *Parke*, and though occasional hardships may have arisen from it, it has generally done substantial justice. For my own part, I am entirely dissatisfied with the story told by the bankrupt, and believe that the robbery he speaks of was altogether fictitious.]

There are also several defects of form in this warrant. First, after setting out a long series of questions and

(*a*) 6 T. R. 118.

nswers, it adjudicates that the answers are not, "nor are ny of them," satisfactory to the commissioner. Now many f them certainly are obviously satisfactory, and therefore e commissioner ought to have specified those which were ot so: *In re Hadland* (a). Some of the answers, moreover, ere recalled by the bankrupt towards the close of the examination; he was surely, therefore, improperly committed 1 them. [*Pollock*, C. B.—It would not be sufficient to say at some of the answers were unsatisfactory, because they ight be cleared up by others. The answers are unsatisctory upon the whole, as answers to the inquiry respecting e money alleged to have been stolen. *Parke*, B.—We ust take the examination as a whole, it being all directed one object, namely, to obtain some account of a large sum money, supposed to be in the bankrupt's possession.] econdly, the warrant is not in accordance with the statute, asmuch as it directs the bankrupt to be committed until shall submit himself to the commissioner, and answer safactorily "the questions so put to him as aforesaid:" hereas, what the statute empowers the commissioner to do to commit the bankrupt until he shall make full answer his satisfaction "to such questions as *shall be* put to him." ere the bankrupt is committed until he answer questions hich may never be put to him again. [*Pollock*, C. B.—he form of this warrant is the one usually adopted; it is e form which was used in *Rex* v. *Perrot* (b), where the arrant was good.] So it was also in *Ex parte Dauncey* (c); ut in neither of those cases was this objection taken. The arrant should be in the form adopted in *Miller's case* (d), irecting the bankrupt to be committed until he answer atisfactorily "all such questions as shall be put to him."

Thirdly, the name of the messenger, to whom the war-

(a) 1 Dowl. P. C., N. S., 835.
(b) 2 Burr. 1122.
(c) 12 M. & W. 271.
(d) 3 Wils. 420; 2 W. Bla. 881.

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rant is directed, is not stated. The warrant ought to state the name of the party who is to execute it.

POLLOCK, C. B.—I think no rule ought to be granted. I observe that in *Miller's case* one objection taken was that the warrant concluded as it did, and that it did not follow the form adopted in *Rex* v. *Perrot*, which the warrant now before us does. The Court discharged the bankrupt on other objections, remarking that the conclusion of the warrant appeared to be wrong, but that they would give no opinion on that point, further than that in *Rex* v. *Perrot* the conclusion was right. This objection is altogether of a grammatical nature; and as there is a decision upon the point, I think we ought to be bound by it. There is nothing in the other objections.

PARKE, B.—This section of the statute is certainly not very clearly expressed; for it says, that if the bankrupt shall not answer satisfactorily any question *put* to him, the commissioners may commit him to prison until he make answer to their satisfaction to such questions as *shall be* put to him. The meaning, however, must be taken to be, that he is to be committed until he answers the questions already put; that it refers to the bygone questions, and not to fresh questions to be afterwards put. The words "shall be put" refer to questions that shall be put after the passing of the act. It must be recollected that this is not a new enactment, but is copied from former statutes; and we ought, therefore, to adopt the construction which has been already put upon the same words in those statutes, in the cases referred to by my Lord. This warrant agrees also, in its conclusion, with those given in the books of forms.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

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COBBETT v. OLDFIELD.

An affidavit will be rejected which does not contain the proper additions of all the deponents. Where a rule has been obtained on an affidavit, the jurat of which is defective in not containing the names of the respective deponents sworn, pursuant to the rules of this Court, Mich., 37 Geo. 3, and Trin., 1 Geo. 4, the Court will discharge the rule, *with costs*.

A RULE had been obtained, calling upon the defendant to shew cause why an attachment should not issue against him for contempt of this Court. The affidavit on which the rule was obtained commenced thus:—"Affidavit of William Cobbett, a prisoner in the Queen's Prison, the above-named plaintiff, and Alfred Sims, of No. 3, Marlborough Head Court, Holland Street, Blackfriars Road, in the parish of Christ Church, in the county of Surrey." The jurats were in the following form:—

"Sworn at the Queen's Prison, in the county of Surrey, the 23rd day of January, 1847, before me, J. C. Evison, a commissioner &c.—WILLIAM COBBETT."

"Sworn in Court, at Westminster Hall, the 23rd day of January, 1847, before me, T. J. Pratt.—ALFRED SIMS."

G. T. White shewed cause, and objected that the affidavit was informal. First, the addition of the deponent Sims is not given. The addition to every deponent's name is expressly required by the general rule of Hilary Term, 2 Will. 4, art. 5. And where, in a joint affidavit, there is an objection to the description of one of the deponents, the Court will not enter upon an inquiry whether the statements of his co-deponent are sufficient to sustain the application: *Rex* v. *Justices of Carnarvonshire* (*a*).—He cited also *Lawson* v. *Case* (*b*), and *Regina* v. *Reeve* (*c*).

Secondly, the jurat is defective, in not containing the names of the respective deponents sworn, pursuant to the rules of this Court, of Michaelmas Term 37 Geo. 3, and Trinity 1 Geo. 4; and for this defect the rule must be dis-

(*a*) 5 Nev. & M. 364. (*b*) 1 C. & M. 481.
(*c*) 4 Q. B. 211.

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charged with costs: *Frost* v. *Hayward* (*a*), *Blackwell* v. *Allen* (*b*).

Pashley, contrà.—This is quite a different case from *Frost* v. *Hayward*, where a gross blunder had been committed, the affidavit having been sworn before a person who had manifestly no jurisdiction. This is a mere informality, of the most trivial kind.

POLLOCK, C. B.—I think we are bound by the authorities to discharge this rule with costs; and I do not think it is at all unreasonable. If a motion is made on defective affidavits, why should the opposite party be put to the expense of opposing the application, when, upon the objection being taken, it appears that the affidavits ought not to have been read?

ALDERSON, B.—We are bound by the case of *Blackwell* v. *Allen* to discharge this rule with costs.

The other Barons concurred.

Rule discharged, with costs.

(*a*) 10 M. & W. 673. (*b*) 7 M. & W. 146.

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ASHLEY and Others *v.* PRATT and Others. *Feb.* 1.

Insurance on ship, at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope. The ship sailed from Liverpool direct to a port in China, having on board a cargo for that port and Manilla; from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla, the captain took on board, on freight, 230 chests of opium for Tongkoo, another port in China (not being thereby a

IS was an action of assumpsit upon a policy of in-
nce for £1000, upon the ship "Mars." The declaration
d a total loss by perils of the seas during the voyage
red; it also contained counts for money had and re-
d, and upon an account stated. The defendants pleaded,
non assumpserunt; secondly, to the count on the
y, a denial of the loss stated; thirdly, to the same
t, that the loss stated occurred during a deviation by
onsent and direction of the plaintiffs. The plaintiffs
d issue upon the first two pleas, and replied de injuriâ
e last, on which also issue was joined. It was agreed
reen the parties, and an order made accordingly, dated
11th day of April, 1843, by the late Lord *Abinger*, C.B.,
the facts should be stated for the opinion of the Court
e following special case, which was afterwards turned
a special verdict.

he plaintiffs, Messrs. Ashley Brothers, of Liverpool,
-brokers, and Mr. John Worrall, of Liverpool, mer-
t, (being owners, duly registered, of the ship Mars,
Liverpool, Gardner, master), by Messrs. Wise, Far-
ge, & Co., their brokers, effected a policy of insurance,
d 27th day of May, 1839, with the General Maritime
rance Company, London, which was duly subscribed by
defendants, being three of the directors of such com-
, for £1000, upon such ship, "lost or not lost, at and
Liverpool *to ports and places in China and Manilla,*
r any, during the ship's stay there for any purposes,
from thence to her port or ports of calling and discharge

part laden), and sailed for Tongkoo, there to seek a freight for the United Kingdom, n her voyage thither was lost by perils of the seas. Tongkoo is quite out of the direct from Manilla to the United Kingdom:—

ld, that the words "from thence," in the policy, meant not "from Manilla" only, but n ports or places in China and Manilla, all or any;" and that the sailing from Manilla to koo, for the purpose of seeking a homeward cargo, was not a deviation.

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in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope." The Mars sailed on the 5th of July, 1839, direct from Liverpool to the port of Lintin, in China, having on board a cargo on account of Messrs. Wise, Holiday, & Co., for Lintin aforesaid and Manilla, and some goods for the same places on the owners' account. The master of the Mars was instructed, after discharging such outward cargo, to seek, for owners' account, for a return cargo for the United Kingdom. The Mars arrived on the coast of China, and on her arrival, on account of the disturbances there existing between the British and Chinese, was immediately ordered, with all other British merchant vessels, by her Majesty's ship Volage, to go to Tongkoo, which is only a few miles from and in sight of Lintin, and in lat. 22° 25′ North, long. 113° 40′ East. She arrived at Tongkoo on the 23rd of November, 1839, and there discharged part of her cargo. The Mars proceeded from Tongkoo on the 9th of December, 1839, to Manilla, and arrived there on the 16th of December, 1839, and there discharged the remainder of her outward cargo, with the exception of a trifling part belonging to the owners. Manilla is in lat. 14° 35′ North, and long 121° East. The captain, finding freights low at Manilla, took on board there, on freight, 230 chests of opium for Tongkoo, and sailed from Manilla, with the intention of going back to Tongkoo, and there seeking a freight direct back to the United Kingdom; and while so sailing from Manilla towards and in the direction of Tongkoo, and having got to lat. 21° North, long. 117° East, by the Pratas shoal, the ship Mars was, by the perils of the seas, wrecked and totally lost, on the 13th of January, 1840.

When the Mars sailed from Manilla, with the 230 chests of opium on board, she was not a tenth part laden. Manilla is only seven or eight days' sail from Tongkoo, in favourable weather. Lintin and Tongkoo are both places in China, which lie in the course of a voyage from Liverpool

to China and Manilla. The regular and usual course of a voyage from Manilla to the United Kingdom is S. S. W., for the purpose of passing through the Straits of Sunda, and thence round the Cape of Good Hope; and in the course of such voyage the ship would not have gone to the northward of Manilla. The regular and usual course of a voyage from Manilla to Tongkoo, and that pursued by the Mars on the present occasion, is north-westerly; and the point at which she had arrived at the time of the accident is altogether out of the regular and usual course of a voyage from Manilla to the United Kingdom, though in the regular and direct course of a voyage from Manilla to Tongkoo. One hundred and ten to one hundred and twenty days is about the average duration of a voyage from the United Kingdom to China or Manilla, and also of a voyage from China or Manilla to the United Kingdom. The north-east monsoon is not so favourable to a passage from Manilla to Tongkoo as the south-west monsoon. The monsoon always blows from the north-east in December and January, and with the greatest strength. In the months of December, January, and February, the voyage from Manilla to Tongkoo can be made during the north-east monsoon without any extraordinary danger, but a vessel must sail a longer distance in making a voyage from Manilla to Tongkoo during the north-east than the south-west monsoon.

The due subscription of the policy by the defendants, as directors of the General Maritime Insurance Company, London, is admitted, as also the sufficiency of the capital stock and funds of the company, and of the shares of the defendants therein, to pay and satisfy the plaintiffs the amount insured; and the agency of Wise, Farbridge, & Company, as alleged in the declaration, and the plaintiffs' interest in the subject matter of insurance to the amount of all the money by them insured thereon, are also admitted.

It is agreed that the pleadings and policy annexed may be referred to by either party as part of this case, and that

a special verdict, and to bring a writ of error t
such special verdict to be settled by a judge of th
and all inferences of fact which this Court may d
the hearing of the special case are to be stated s
the special verdict.

The question for the opinion of this Court is
the plaintiffs are or are not entitled, under the circu
to recover in this action any and what amount
Court shall be of opinion that the plaintiffs are s
then judgment is to be entered for the plaintiffs l
sion, for such amount as the Court shall think
plaintiffs are entitled to recover; but if the Cou
of opinion that the plaintiffs are not entitled t
anything, then a judgment of nolle prosequi shall b
unless in either case the Court shall think fit tha
shall be turned into a special verdict, in which c
ment shall be entered upon such special verdict,
to the directions of this Court.

The case was argued in Easter Term, 1846, (Ap

Martin for the plaintiffs.—The sailing from I
Tongkoo, under the circumstances stated in the
not a deviation whereby the policy was avoided
ship, having discharged her outward cargo at Ma
taken no other goods at all on board at that port,
clearly have had a right, under the terms of this

d places in China and Manilla, all or any, during the ip's stay there for any purposes, and *from thence* to her rt or ports of calling and discharge in the United King- m, with liberty to call and stay at all or any ports or aces on either side of and at the Cape of Good Hope. *Parke,* B.—The other side will contend that the words from thence" mean *from Manilla,* and therefore that she d no right to return from Manilla to China.] According the grammatical construction, "from thence" imports from all or any ports and places in China and Manilla." was clearly intended that the ship should bring a home- rd freight from Manilla *or* China. Such being the reason- le construction of the policy itself, is there any case wherein contrary interpretation has been put upon such words? he only case which can at all be relied on for that purpose r the defendants is the case of *Beatson* v. *Haworth* (*a*). That as an insurance on ship "at and from Fisherow to Gotten- rg, and back *to Leith and Cockenzie.*" It appeared that the ip in the homeward voyage went *first* to Cockenzie, hich lay nearer to Gottenburg than Leith, and was randed in the harbour of Cockenzie. This was holden be a deviation, on the ground that, in the absence of me usage or special facts to vary the general rule, the nstruction of the policy was that the assured must go the places mentioned in it, in the order in which they ere named, and that to depart from that course was a eviation. But that case, if it be law, is not applicable to he present, because here the ship did proceed first to hina, and then to Manilla. *Beatson* v. *Haworth* was de- ided on the authority of *Clason* v. *Simmond* (*b*), there cited, here, in an insurance on a ship at and from London to er ports of discharge in the Streights, as high as Messina, he stopping of the vessel at Marseilles, for which port she had a cargo *on her return,* would be a deviation. That case

(*a*) 6 T. R. 531. (*b*) Park on Ins. 626, 3rd ed.

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is equally distinguishable from the present, for the reason just stated. In *Marsden* v. *Reid* (*a*), the action was upon a policy on goods, at and from Liverpool to Palermo, Messina, Naples, and Leghorn. The ship took in goods and was cleared out from Naples only, and had no goods on board for any other place, Leghorn being known to be in the hands of the French soon after the policy was effected. She was captured by the French in the Bay of Biscay, and consequently before the dividing point to any of the places mentioned in the policy. It was held that there was an inception of the voyage insured against, on the ground that the voyage insured to Palermo, Messina, and Naples, meant a voyage to *all or any* of the places named, with this reserve only, that if the vessel went to more than one place, she must go to them in the order described in the policy. That case is an authority for the plaintiffs. *Gairdner* v. *Senhouse* (*b*) is to the same effect. *Metcalfe* v. *Parry* (*c*) was an insurance at and from Antigua to London, with liberty to call at all or any of the West India islands, Jamaica included. The ship called at St. Kitts; and it was contended, that as that island did not lie between Antigua and London, the calling there was a deviation; but *Gibbs*, C. J., ruled, that as the assured had leave to go to Jamaica, 500 miles out of course, it was clear that the parties intended that they might stop at any of the West India islands, though not in course. In *Bragg* v. *Anderson* (*d*) a policy at and from Martinique and all and every West India Islands was held to warrant a course from Martinique to islands not in the course of the homeward voyage. So in *Lambert* v. *Liddard* (*e*), a policy at and from Pernambuco, or any other port or ports on the coast of the Brazils, to London, was held to warrant the assured, if he could not get a cargo at Pernambuco, to go to any

(*a*) 3 East, 572.
(*b*) 3 Taunt. 16.
(*c*) 4 Campb. 123.
(*d*) 4 Taunt. 229.
(*e*) 5 Taunt. 480; 1 Marsh. 149.

other port or ports on that coast till he got a cargo, not restricting him to those which lay in the direct course between Pernambuco and London. That case appears to be directly in point. There the vessel, having tried for a cargo at Pernambuco, as in this case at Manilla, went for a cargo upon a voyage 600 miles to the southward of her direct course to her port of discharge; yet this was held not to be a deviation. In *Hunter* v. *Leathley* (*a*) the policy was effected upon goods in certain vessels on a voyage at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, beginning the adventure from the loading thereof aboard the said ships as above. The ship took in part of her cargo at Batavia, then went to Sourabaya, another port in the East Indies, not in the course of a voyage from Batavia to Europe, and took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the seas. It was held by the Court of King's Bench, and that judgment was confirmed on error in the Exchequer Chamber, that the going to Sourabaya was not a deviation, and that the goods taken on board there were covered by the policy. So here, the sailing back to China is within the terms of this policy, which are equally general. Besides, it was a sailing there for a necessary purpose, in order to obtain a cargo, and whereby no delay was occasioned, and therefore did not avoid the policy. *Raine* v. *Bell* (*b*), *Cormack* v. *Gladstone* (*c*), *Laroche* v. *Oswin* (*d*). Nor is the case altered by the vessel's taking on board the opium at Manilla. It is obvious that she would require some ballast for the homeward voyage, and it could

(*a*) 10 B. & C. 858; *S. C.* in error, 1 C. & J. 423; 7 Bing. 517.

(*b*) 9 East, 195.

(*c*) 11 East, 347.

(*d*) 12 East, 131.

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make no difference whether she took in opium or stones for that purpose: *Armet* v. *Innes* (*a*).

Watson, for the defendants.—There was a deviation in this case by the ship's going back from Manilla to China. Wherever the insurance is upon a voyage to two or more places named in the policy, all or any, the vessel may go to all or any, but if she does, she must go to them in the order mentioned in the policy, otherwise it is a deviation. Here the ship might go to China, and there take in a homeward cargo; or to Manilla, and there take in a homeward cargo; but she could not go to Manilla, and return to China for a homeward cargo. It is attempted on the other side to make out this to be a sort of double voyage, partly to China and partly to Manilla; but such are not the terms of the policy; it is one voyage, at and from Liverpool "to ports and places in China *and* Manilla, all or any," and "*from thence* to her port or ports of calling and discharge in the United Kingdom," i. e. from China or Manilla homeward, but not from both. The policy does not contain the words "backwards and forwards." It is a voyage to China and Manilla, and then back again to England. *Beatson* v. *Haworth* and *Clason* v. *Simmond* are directly in point for the defendants, and have never been doubted to be law. They are recognised and confirmed by the Court in *Marsden* v. *Reid*. In *Hogg* v. *Horner* (*b*), the ship was insured at and from Lisbon to a port in England, with liberty to call at *any one port in Portugal for any purpose whatever*. She sailed from Lisbon to Faro to complete her loading, Faro being a port to the southward of Lisbon, and consequently lying directly out of the course of the voyage to England: and Lord *Kenyon* held, that the liberty given by the policy must be restrained, or a permission to call at some port to the northward of Lisbon, in the course of the voyage to

(*a*) 4 Moore, 150. (*b*) 1 Marsh. 153; 2 Park on Ins. 626, 3rd ed.

England, and therefore that the sailing to Faro was a deviation. That is a very strong case in favour of the defendants, and never has been questioned. *Ranken* v. *Reeve* (*a*) is another decision precisely to the same effect. If the ship had gone first to Manilla, could she afterwards have gone to China? Clearly not; and the case is in no respect altered by her having gone first to China, having proceeded from thence to Manilla, a port afterwards named in the policy. Suppose it had been, at and from Liverpool to any port or places in China and the Cape of Good Hope, could she have returned from the Cape to China? With respect to the other cases which have been cited, *Marsden* v. *Reid*, *Lambert* v. *Liddard*, *Metcalfe* v. *Parry*, and *Bragg* v. *Anderson*, were none of them, as here, the case of an insurance on a voyage *out and home*. *Hunter* v. *Leathley* was mainly decided on the effect of the words, "with leave to touch, stay, and trade at all and every ports and places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere;" Persia being entirely out of the course from any of the ports or places previously mentioned to Europe. The very argument in that shews, that, but for such general words, the ship could only go to ports and places in the ordinary course of the voyage insured; but it was clear there that the vessel never could have been intended to come directly home from Singapore to Europe, and that the words, "ports and places in the East Indies, Persia, or elsewhere," occurring in the place they did in the policy, "could not be understood to designate places of shipment of the plaintiff's goods, but only places to which the ship might be permitted to sail for some other purpose (*b*)." Here there is no liberty to trade. The construction contended for on the other side amounts to this, that the assured were entitled to go backwards and forwards till they could find a homeward cargo,

(*a*) 2 Park on Ins. 626. (*b*) Per Lord *Tenterden*, C.J., 10 B. & C. 874.

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and in the meantime to trade. *Hamilton* v. *Sheddon* (*a*) is a very strong case. There the policy was on goods by a certain ship, "at and from Liverpool to any port or ports, place or places of loading and trade on the coast of Africa and African islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharge in the United Kingdom, with leave to call at all ports and places, backwards and forwards, and forwards and backwards, without being deemed any deviation; with liberty, in that voyage, to proceed and sail to and stay at any ports or places whatsoever, and with leave to load, unload, &c., goods, wheresoever she might proceed to, &c." with an agreement that the vessel might be employed or used as a tender to any other vessel in the same employ. The ship arrived at Benin, in Africa, and stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ at the mouth of the river to Camaroone, and there putting them on board another vessel, also in the same employ; and on her return with a homeward cargo, was lost. It was held that this voyage to Camaroone was a deviation. There are no words in this policy to take it out of the general rule of law, as stated in the authorities which have been cited. The same doctrine is laid down in the cases of *Bottomley* v. *Bovill* (*b*), *Solly* v. *Whitmore* (*c*), and *Hammond* v. *Reid* (*d*). Further, the taking on board the opium at Manilla, for China, although it was not a full cargo, was clearly a trading not contemplated by the policy.

Martin replied, and contended that the decision in *Hogg* v. *Horner* could not be supported.

Cur. adv. vult.

(*a*) 3 M. & W. 49.
(*b*) 5 B. & C. 210.
(*c*) 5 B. & Ald. 45.
(*d*) 4 B. & Ald. 73.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action on a marine policy f insurance, and the question was, whether the ship on hich the policy had been effected had deviated so far from he voyage in respect of which the risk was created, as to void the liability of the underwriter? There was a verdict or the defendant on the first and second counts; and as to he third, on which issue was joined, at the trial, the jury ound a verdict for the plaintiff, subject to a special case, fterwards turned into the following special verdict. The pecial verdict, after a formal introduction, sets out the olicy and other matters necessary for the maintenance of he action, and then finds the circumstances of the voyage, which alone are material to the question before us, in the following words: [His Lordship read them, as ante, p. 471.]

The question for the decision of the Court on the special verdict is, whether, upon these facts, the vessel's sailing from Manilla to Tongkoo, in search of a homeward freight, was or was not a deviation. If it was authorised by the terms of the policy, the plaintiffs are entitled to the judgment of the Court; if not, the defendants.

It is manifest that the solution of this question must depend, in the first place, upon the meaning of the word "thence" in this policy. If this means Manilla only, as contended by the defendants, and therefore that the vessel was to sail from Manilla on her homeward voyage, it was a deviation to go to Tongkoo to seek for freight, Tongkoo being out of the course of the voyage from Manilla to this country. If "thence" refers to "ports and places in China and Manilla," then what has occurred is not necessarily a deviation, and it remains to be considered whether it is within the scope and meaning of the policy. We are of opinion that the word "thence" does not mean Manilla only, but includes all the ports and places to which the homeward voyage might have been directed. This is purely a question

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of construction; and it is quite clear that it was not necessary that the vessel should go to Manilla at all; and though not one of the "ports and places in China" to which the vessel intended to go, it might, in some event, become the port from which the homeward voyage should commence; for the vessel might possibly have gone to no osher "port or place," and would be fully at liberty to confine the departure to that one "port or place." The word "thence" must therefore be read so as to meet the obvious meaning of the policy for all cases, and for that purpose must be read as including all the "ports and places in China," as well as Manilla, and then the policy would stand thus—"to ports and places in China and Manilla, all or any, during the ship's stay there, and from the ports and places in China and Manilla, to her ports or places of calling and discharge" in this country. Then comes the main question, whether, under the policy so made, the voyage from Manilla to Tongkoo in search of freight was a deviation. On the part of the plaintiffs it was contended, that having discharged all the freight of the outward cargo for Manilla, the captain was at liberty to go to Tongkoo to seek a freight, and was not bound to sail direct for this country from Manilla. On the part of the defendants it was contended, that the voyage must be pursued in the order of the places as named in the policy, and the returning to any port or place in China was taking the ports named in the policy in an inverse order. At the bar, the cases of *Beatson* v. *Haworth*, *Marsden* v. *Reid*, *Gairdner* v. *Senhouse*, *Bragg* v. *Anderson*, *Solly* v. *Whitmore*, and others, were cited to illustrate the doctrine upon this subject of alleged rules of deviation; and no doubt, where a voyage is described to specified ports, as from A. to B., and B. to C., and especially where such is the regular course of the voyage, it is a deviation to go to C. before B., and if the voyage be intended for both, *Marsden* v. *Reid* decided that such a vessel need not go to all the ports, but she must take such as she

sailed to in the order named in the policy. But in *Metcalfe* v. *Parry*, *Gibbs*, C. J., says (*a*), that the liberty "to touch at all or any of the West India islands, Jamaica included," shews decisively that they might be taken without any regard to their geographical order, for the purpose of seeking a freight. The decision in *Solly* v. *Whitmore* might give rise to an argument that the sailing to Tongkoo was a deviation, if the vessel had gone there for purposes unconnected with the homeward voyage: but *Abbott*, C. J., says, that if the vessel was going to get a cargo, that would be a purpose connected with the voyage, and consequently not a deviation. The facts in the other cases cited vary so much from the present, that no particular notice of them is necessary; but it cannot be doubted that the general doctrine relied upon by the defendants' counsel is well established: the question is, how far it applies to this case, and the point to be considered is, whether the vessel, after discharging the last portion of her cargo at Manilla, was at liberty to go to Tongkoo to procure a freight; and we are of opinion, that the sailing to Tongkoo for a purpose connected with the homeward voyage was not a deviation, the homeward voyage being, as we read the policy, "from ports or places in China and Manilla, all or any of them, to her port or ports of calling and discharge." On this ground, we think the vessel, having sailed from Manilla to Tongkoo for a purpose connected with the homeward voyage, was sailing within the liberty given by the policy.

In the course of the argument, the fact of goods being shipped at Manilla for Tongkoo, not for the homeward voyage, was urged, but not much relied upon; but as the jury have found that the risk was not thereby increased, we are of opinion, upon the authority of *Laroche* v. *Oswin* (*b*), and other cases, that this made no difference, and the plaintiffs, therefore, are entitled to the judgment of the Court.

Judgment for the plaintiff.

(*a*) 4 Campb. 124. (*b*) 12 East, 131.

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VACATION SITTINGS AFTER HILARY TERM.

Feb. 6.

PHEYSEY and SARAH his Wife *v.* RICHARD VICARY.

A., being a termor of land, built two houses on it. The whole was then released to him in fee, "with all ways, easements, advantages, and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied, or enjoyed." By his will, he devised one house, and the appurtenances thereunto belonging, to B., and the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B., was by a set-out carriage drive or sweep, entering from a high road passing immediately in front of the house afterwards devised to C., to B.'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house opening only into the high road and a back entrance into the same. After A.'s death, C. made a fence across so much of the carriage drive as passed immediately in front of his house, and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass claiming the way as appurtenant to his house and garden:—*Held*, first, that the way, as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him, under the word "appurtenances" in A.'s will; and secondly, *comme semble*, that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had.

Semble, nothing of absolute necessity to a building, e. g. a gutter in alieno solo, to carry off water, &c., is extinguished by unity of ownership.

CASE for disturbance of a way.—The declaration stated that the plaintiffs were lawfully possessed of a certain messuage and garden thereunto belonging, with the appurtenances in right of the said Sarah, and by reason thereof ought to have a certain way from and out of the said messuage and garden unto and into a certain close in the parish of D., in the county of D., and from and out of the same close unto and into a certain common highway leading from the Exeter-road to Queen-street, in the county aforesaid and so back again from the said common highway unto and into the said close, and from and out of the same unto and into the said messuage and garden of the plaintiffs for themselves and their servants, on foot, and with horses and carriages, to go, return, pass, and repass, every year at all times of the year, at their free will and pleasure "as to the said messuage and garden, together with the

appurtenances of the plaintiffs thereto belonging and appertaining;" yet the defendant placed boards and dug a ditch across the said way, and by so doing obstructed and stopped up the same; by means whereof the plaintiffs were hindered from using and enjoying the same. Pleas, 1. Not guilty; 2. A denial of the right of way, as to the messuage and garden, with the appurtenances, of the plaintiffs belonging or appertaining. Issues thereon.

At the trial, at the last Devonshire assizes, before *Erle*, J., it appeared, that, on 9th April, 1812, A. Vicary the younger, being seised in fee, bargained, sold, and demised to A. Vicary the elder, part of Long Close, in the parish of Dawlish, for 500 years. By lease and release, respectively dated on 17th and 18th December, 1827, A. Vicary the younger, reciting that A. Vicary the elder had built two houses on the above piece of land, conveyed all the remainder and reversion of and in all the said premises demised by the said indenture of 9th April, 1812, to A. Vicary the elder, "together with the said messuages or dwelling-houses and offices which the said A. Vicary the elder had so erected and built thereon as aforesaid; all which said hereditaments and premises were then in the possession of the said A. Vicary the elder, his tenant or tenants; and all houses, ways, easements, advantages, and appurtenances thereto belonging, or therewith usually used, leased, held, occupied, or enjoyed; to hold the said remainder and reversion of and in the said premises, with the appurtenances, unto and to the use of the said A. Vicary the elder, his heirs and assigns for ever."

By will of 23rd October, 1827, A. Vicary the elder gave, devised, and bequeathed all his freehold hereditaments in West Teignmouth, Dawlish, and elsewhere, in the county of Devon, with their respective rights, members, and appurtenances, unto W. Tapley and his heirs, to the use of A. Vicary the younger, for life; remainder to the use of W.

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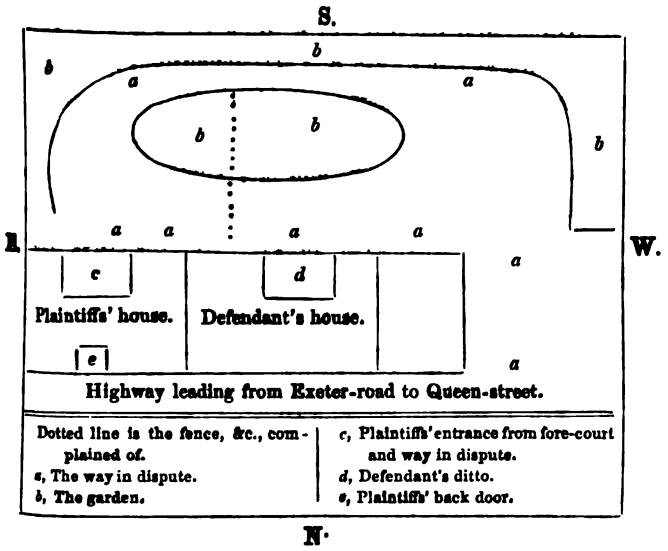
Tapley and his heirs during the natural life of A. ' the younger, in trust to support the contingent remai and from and after the decease of A. Vicary the yo as to, for, and concerning all that freehold messu dwelling-house, with the garden in front and on th side thereof, 'and the appurtenances thereunto belo situate and lying at Dawlish Strand, in the said pa Dawlish, being the last messuage and premises w have erected there, and now let out as a lodging-hou the use of my grandson, Richard Vicary (the defen second son of the said A. Vicary the younger, hi and assigns, for ever; and as to, for, and concerni that other freehold messuage or dwelling-house, lyi the eastern side of the last-mentioned messuage, to with the garden in front and on the eastern side t and the coach-house, stable, curtilage, '*and the tenances thereto belonging*,' also situate and lying at D Strand aforesaid, being the first messuage and pr which I erected there, and now also let out as a lo house, to the use of my granddaughter Sarah Vica eldest daughter of the said A. Vicary the youngc heirs and assigns for ever, provided she should live to the age of twenty-one years."

In July, 1831, A. Vicary, senior, died. A. Vica younger died on the 4th December, 1842. Sarah V his eldest daughter, attained the age of twenty-one and in 1843 married the plaintiff. By her marriag tlement, executed before her marriage, and dated March, 1843, the premises last above mentioned wer veyed to trustees to her sole and separate use. T death of A. Vicary the younger, the unity of own of both sets of premises continued, and the way n question was used in common by the occupiers o houses, being a hard carriage drive, set out, and abutti both. The plaintiffs' house had a back way into the E

road; also a coach-house and stables, the only access to which was from that road. The following is a plan of both sets of premises:—



The way was not claimed as a way of necessity at the trial. The learned judge held that the will must be read with reference to the prior conveyance of 1812 to the testator, so as to pass the right of way claimed as used with the plaintiffs' house in the testator's time. The plaintiffs had a verdict, with leave to the defendant to move to enter a nonsuit, or verdict for the defendant on the second issue.

A rule having been obtained to enter a verdict for the defendant accordingly,

Crowder and *M. Smith* shewed caused on 30th January. —No right of way could exist while A. Vicary the elder lived, the whole being his own property (*a*). Then there

(*a*) *Holme* v. *Goring*, 2 Bing. 76; 9 B. Moore, 166.

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was either an implied grant of this right of way by his will, or it would pass as a matter of convenience, if not of absolute necessity. First, there was an implied grant of this way; for it is clear, that if a single tenement is divided by the owner, and certain ways, drains, &c. are enjoyed to all appearance continuously and permanently with the two tenements, those easements pass with it. The deed of 1812, by which A. Vicary, senior, took the fee, passes all ways, easements, advantages, and appurtenances to the piece of land belonging or therewith enjoyed. [*Parke*, B.—The tenement was at that time entire. The question now is, what did the testator mean to convey to each devisee on dividing it by his will; and the difficulty is to find in that instrument words apt for effectuating what is likely to have been his intention.] No appurtenances here in fact existed. *Hinchcliffe* v. *Earl of Kinnoul* (*a*) turns not on that word, but on the terms of the conveyance set out in the special verdict. Though that expression in a deed must have a particular legal construction (*b*), it is otherwise in a will, where the testator's intention governs, unless against law. In this case, after the division of the houses by will, those rights, members, and appurtenances which were necessary to the reasonable enjoyment of each house, including this right of way, passed with it by the will; for it is an easement of a permanent nature, viz. a carriage-drive set out to the plaintiffs' own door, and as apparent as a right of water-course. In the work of Messrs. Gale and Whatley on Easements, pp. 49, 50, it is said, "Upon the severance of a heritage, a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence during that period as

(*a*) 5 Bing., N. C., 1.

(*b*) "Unless the intention of the parties to the contrary appears: that is the result of *Morris* v. *Edgington*," 3 Taunt. 24: Per Lord *Lyndhurst*, C. B., in *Barlow* v. *Rhodes*, 3 Tyr. 282.

easements; and, second, of all those easements without which the enjoyment of the severed portion scould not be fully had. The latter class are usually termed easements of necessity." It is then shewn, from Pardessus, Traité des Servitudes, s. 288, that "in France, where several heritages (fonds) which belonged to one owner became the property of different owners, whether by alienation or division among his heirs, the service which the one derived from the other, which was simple 'destination du père de famille' (viz. the common owner of one or more heritages), as long as they belonged to the same owner, becomes a 'servitude' as soon as they pass into the hands of the different proprietors." Afterwards (p. 53) is quoted the Code Civil, Arts. 692 and 693:—"The 'destination du père de famille' confers a title (vaut titre) to servitudes which are apparent and continuous. If the proprietor of two heritages, between which there exists an apparent sign (signe apparent) of servitude, disposes of one of the heritages without any stipulation (convention) being contained in the contract respecting the servitude, it continues to exist actively or passively in favour of the heritage alienated or upon it." Pardessus (ubi supra) is then cited to shew that this disposition (état des lieux), which from a simple "destination du père de famille" thus changes itself into a servitude, must be such as is absolutely necessary, not one serving only for purposes purely personal or mere pleasure. [*Parke*, B.—The treatise cited is a very good one. *Shury* v. *Pigot* (*a*) distinguishes water-courses and ways of necessity from other ways and easements, which are extinguished by unity of ownership. If it is necessary to the safety of a house that water should flow down a drain, the right of water-course through it is reserved by implication in every grant of the house. Many other

(*a*) Most fully reported in Popham, 166; S. C., 3 Bulstrode, 339; Jones, R. 145; Noy, 84; Latch, 153; sometimes printed *Shewry and Pigot*.

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cases recognise the distinction taken in *Shury* v. *Pigot*. *Alderson*, B.—In that case, *Doddridge*, J., puts the way of necessity on the same footing as a water-course or gutter. Its principle seems to be, that nothing of absolute necessity to the tenement is extinguished by unity of ownership or possession.] Here, on the division by the proprietor of the houses, he had built an approach or drive, common to both, apparent and stamped on the land; is not that drive permanent, and used with each house, even if, from the circumstance of there being a door at the back of one into a road, it is not absolutely necessary? [*Parke*, B.—That is the question. You would argue, that, if it is a mere right of way, it would not pass by the will; whereas if it is such a right of way as you would call permanent, it must.] The plaintiff could get in at his back door, but has a right to the reasonable enjoyment of his house, and of the front approach to it, which comprises the whole beauty of the Strand of Dawlish. [*Pollock*, C. B.—The whole law, admitted to be such as to drains and water-courses, turns on the right to "reasonable enjoyment" of the house. Had the backway from the plaintiffs' house into the road been originally walled up, the front way might still be said to be in some sense not of necessity, for the present entrance might have been made out of the back wall.] In *Palmer* v. *Fletcher* (*a*), a man had erected a house on his own land, which he afterwards sold to one, and the land adjoining to another, who obstructed the lights of the house; and it was held that he could not do so, any more than the vendor himself could, who could not derogate from his own grant, for the lights were a necessary part of the house. In *Nicolas* v. *Chamberlain* (*b*), it is held that if one (having a permanent estate of inheritance) erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and after-

(*a*) 1 Lev. 122. (*b*) Cro. Jac. 121.

wards sell the house "with the appurtenances," excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because necessary and quasi appendant thereto; and he shall have liberty by law to dig in the land for mending the pipes, or making them new, as the case may require. In London, the front door might be said to be not actually necessary, where there is another entrance to the basement by the area steps. [*Alderson*, B.—The learned judge thought that the will was to be construed with reference to the conveyance, as passing the way claimed, not as of necessity, but as used with the house in the testator's time (*a*). *Parke*, B.—That ruling cannot be supported. The way can only pass by one of two modes, viz. either under the word "appurtenances" in the will, or as of necessity. A right of way to one of two houses, though of necessity, may be extinguished by unity of ownership or possession, though, when either house is re-granted singly, it would pass by implication as necessarily incident to that grant (*b*). *Platt*, B.—The drive round the middle garden to the plaintiffs' door and back into the road remains open.] In *Morris* v. *Edgington* (*c*), *Mansfield*, C. J., intimates that that may be a "necessary" way, without which the most convenient and reasonable mode of enjoying the premises could not be had. After illustrating the particular case, he concludes by saying, that the decision of the Court does not at all break in on the cases in which it is held that easements are extinguished by unity of possession. [*Parke*, B.—The words "therewith used" are generally

(*a*) See *Clements* v. *Lambert*, 1 Taunt. 209; confirmed in 3 Taunt. 31; and see 3 Tyr. 283, 285.

(*b*) See Year Book, 11 H. 7, 25; cited Popham, 167, and fully stated, Gale and Whatley, 55; also authorities collected, 1 Bos. & P. 374, n.; 5 Tyr. 812, n.; 3 Tyr. 282; 2 Tyr. 156.

(*c*) 3 Taunt. 24, 31; considered and explained per Cur. *Barlow* v. *Rhodes*, 1 Cr. & M. 439; 3 Tyr. 280; and see 5 Taunt. 311.

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introduced to comprehend easements, if any exist, viz. where there are no appurtenances legally so called (a). *Bayley*, B., in *Barlow* v. *Rhodes* (b), says that in *Morris* v. *Edgington* it was not requisite to ascertain the sense of the word "appertaining," for there was no other mode of getting at the tap-room but by one of the ways claimed; and all that the Court decided was, that there being two ways, each of necessity, the party was entitled to that which was most convenient to the party requiring it. *Alderson*, B.—Convenience must be secundum subjectam materiem. A carriage from the plaintiffs' coach-house could not approach the principal parts of their house by the back entrance; and to be obliged to go to it by the stables or kitchen at all times would injure its value.] This way was not such as existed only in contemplation of law, but was permanently impressed on the land before the single ownership of the houses concluded, and therefore continues and passes with each. Drains and windows are equally cases of easements, but have no more character of perpetuity than this way. *Canham* v. *Fisk* (c) was an action for diverting a water-course which arose at a spring in Broomhill, a close above the plaintiff's garden, and in its course through it was used by the plaintiff. Both Broomhill and the garden were in the same hands till 1811. Lord *Lyndhurst*, C. B., says: "The plaintiff has had possession since 1811 of the land over which this water flowed. That possession imports a fee in the plaintiff, which could only pass by grant. That grant, though silent as to the water which flowed over the land, would pass it; though the reverse may be the case where the water running over another man's land is granted. Then because the conveyance of the garden is not produced, can we presume it to have contained an exception of the

(a) See per Lord *Lyndhurst*, C. B., 3 Tyr. 282, 283, *Barlow* v. *Rhodes*.

(b) 3 Tyr. 286, 287.

(c) 2 Tyr. 155; 2 Cr. & J. 126.

:?" As to the meaning of "appurtenances," this case ıbles *James* v. *Plant* (*a*), where that word, occurring in d, was held not to be confined to that which is in legal ness an appurtenant, such as an easement, the enjoy- whereof has never been interrupted by unity of pos- n, or extinguished by unity of ownership; but was held ; in and comprehend a right of way which had been ally held, used, occupied, or enjoyed," with the parti- tenement as before expressed in the operative part of ɜed itself, i. e. the very way in dispute. [*Parke*, B.— ɜ Exchequer Chamber, the word was held to pass a road ıg from one tenement to another, but not over the or's whole ground. *Pollock*, C. B., mentioned *Osborne* v. (*b*).] The terms used in a will are in general to be ı in their popular sense (*c*); and the testator's intention be gathered from his position as to the adjacent pro- . [*Parke*, B., mentioned *Dand* v. *Kingscote* (*d*)].

tt and *Merivale* were now heard in support of the —The way in issue on the pleadings, and claimed at ial, was a way appurtenant to the plaintiffs' house and n. [*Parke*, B.—If it passed as a way of necessity, the ation is good.] When the two houses passed from ands of one person into those of two, it became im- ıt to the defendant that carriages should not pass close front windows on their way to the plaintiffs' front door. defendant therefore stopped that way, leaving the way to the plaintiffs' front door as before, with room n a carriage there, and return by the same way to the ace common to both from the high road. The French lready cited distinguishes between apparent and non-

In error, 4 Ad. & E. 749, S. C., 5 B. & Adol. 797; ee cases collected, *Cholley* v. *Clinton*, 2 B. & Ald.

(*b*) 7 C. & P. 761.

(*c*) See 2 Jarman, 741, 2nd and 10th rules of construction of a will.

(*d*) 6 M. & W. 174.

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apparent servitudes, the former being doors, windows, water-courses, &c., viz., matters absolutely necessary to the use of a house, as distinguished from ordinary rights of way, not of that absolute necessity. That corresponds with *Shury* v. *Pigot* (*a*). But this is in fact a question of construction of the will, and the effect of the documents proved at the trial,—not what the testator intended in the popular sense of the word. Nothing can pass by the devise of this house *with the appurtenances* which is not appurtenant. A way of necessity is a right or easement of necessity, and should not be confounded with cases turning on the construction of the words "appurtenances," or "ways used therewith," which latter words, if used in this will, would have disposed of this case. [*Parke*, B.—It is impossible to call this an appurtenant way, unless that word when used in a will has a different sense from that applicable to it in a deed.] *Whalley* v. *Tompson* (*b*) is a leading case on this subject. There A., being seised in fee of two adjoining closes, B. and C., over the former of which, B., a way had been immemorially used to the latter, C., devised both to D. with the "appurtenances," and it was held that the old right of way over B. to C. was extinguished by the unity of seisin in the devisee, and that no such new right was created under the word "appurtenances." [*Parke*, B.—I find no authority to shew that "appurtenances," in a will, has a different meaning from that term in a deed. The only question here is, whether this nearer and more convenient way for a carriage to come to the plaintiffs' front door is a way of necessity. Now, if a carriage-way of necessity passes in this case, it must be the nearest way from the highway, viz. along the front windows. A direct way from the high road to the inner house, viz. the plaintiffs', would have been no inconvenience to either.] The point as to its being a way of necessity, either absolutely, or as a matter of convenience, was first taken in the argument

(*a*) Popham, 166, ante, p. 489, n. (*b*) 1 Bos. & P. 371.

is rule. [*Alderson*, B.—That would be a ground trial. *Parke*, B.—Is the way contended for by iffs to be construed as of absolute necessity for roperty in its strict sense, as in the older cases, or ry to the convenient enjoyment of his dwelling-h reference to its condition at the time the testator er of it, as put in *Morris* v. *Edgington* (*a*), by Sir *ufield*, who says "it would not be a great stretch t a necessary way, without which the most con-d reasonable mode of enjoying the premises could "? One or other of the ways there in question ial to the use of the house, and the Court ruled most convenient of them was that way of neces-ich the party was entitled. That decision is con-*Barlow* v. *Rhodes* (*b*), which shews that the way *Morris* v. *Edgington* might be so claimed as a cessity.] Such a way of necessity passes as is the use of the dwelling-house. [*Alderson*, B.—been not a dwelling-house, but a field used for way which would pass must be such as would owner to use the field in every possible way, wagons, &c. in. Then, in this case of a dwelling-t not the way be such as would enable him to get ly to every part of it?] Supposing this a field, nvenient wagon way into it would be the road law, but there would be no other road over the (*c*). Here the back way to the plaintiffs' house xeter-road prevents the way claimed from being essity. [*Rolfe*, B.—A way of necessity means nt way to the close, not to the house as here *Hinchliff* v. *Earl of Kinnoul* (*d*) supports that *lderson*, B.—A way of necessity does not neces-

nt. 31.
. 280. See the judg-
yley, B., p. 287.

(*c*) See *James* v. *Plant*, cited ante, p. 493.
(*d*) 5 Bing., N. C., 1.

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sarily mean the most convenient way that could by possibility exist. The way claimed here would prevent the plaintiff or defendant from adding to their houses in front.] A way from the high road to the plaintiffs' front door still remains, though a little longer than that claimed. If a way of necessity accrues at the *close*, though not at a particular place in it which may be most convenient to the occupier, that is sufficient, and its convenience is immaterial.

PARKE, B.—The only thing that would pass by the word "appurtenances," as used in this will, would be a way of necessity. That, however, would not be itself a continuous or permanent easement, but one to be exercised from time to time while the necessity continued to occur. There seems slight if any ground for holding this to be such.

ALDERSON, B.—There may be a question whether, instead of ordering the entry of a verdict for the defendant, or of a nonsuit, according to the leave given at the trial, we should grant a new trial, to try whether the way claimed was necessary to the convenient occupation of the plaintiffs' house.

The plaintiffs' counsel consented to a rule being made absolute for a nonsuit, the defendant undertaking to grant a right of way to the plaintiffs, to be set out at their expense between certain points, to be marked on the plan by one of the learned barons, no other action to be brought for the trespass sued for in this case.

Rule accordingly.

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ıe several Demises of WILLIAM INMAN WELSH, WELSH, WILLIAM GOODENOUGH HAYTER, ED-ɔOVELL, and THOMAS INMAN WELSH, *v.* ELIZA-ıANGFIELD and ANN LANGFIELD.

An award, allotting land under an inclosure act, coupled with the terms of the original claim to such allotment, is admissible in evidence to shew that the claimant's interest in the lands in respect of the possession of which he claimed the allotment was less than the fee.

MENT for copyhold premises in Long Sutton, ınty of Somerset. At the trial, before *Platt*, B., t assizes for that county, it appeared from the ıdduced on behalf of the lessors of the plaintiff, ıany years before 1797, and from that date till his 1828, one Sylvester Langfield had been in pos- f the premises in question, which had formerly ed "Late Banton's," or "Baunton's." The de- were his widow and daughter-in-law, and had been

rmination of a copyhold interest may be shewn without producing the copy of Thus, a declaration by the party in possession, that his interest was less than a his own life only, would be primary evidence that it ceased to exist at his death. e he declared that he held "for life interest," that statement being consistent with ı life interests coming into existence at his death.

ılosure act, the expenses attending the inclosure were to be raised by sale of part of ıable lands, the balance, if any, of the proceeds to be repaid to the landowners. Ac- ales were made, and the surplus proceeds divided among the landowners according ı rate,' divided into two proportions, one calculated according to the 'possessioners' life or years, the other the reversioners' proportion, calculated according to the to elapse before their interest accrued into possession. A landowner in possession, y, received a sum calculated on the assumption that his estate was held for his life; not appear that the party had any knowledge of the paper containing the rate, ata by which the sum he had received was fixed:—*Held*, that the return rate was e to cut down his interest to less than a fee.

closure act, claims to allotments were to be made in writing, and sent to the com- The claims made were entered by their clerk in a book, though not required by ıe so kept. The claims allowed by the commissioners were marked in the book ' and attested by their initials affixed thereto. The entries were made in the course , and at the time they purported to bear date. *Semble*, they were admissible in n proof of the clerk's death, and of a negative search for the original claims in the ɔsitory.

ation by a possessor of land, that he held "for life interest," does not necessarily the right of possession would, immediately at his death, accrue to the reversioner, for e other life interests might exist consistently with the words used. The expression ly ambiguous, would, if relied on for plaintiffs in ejectment, so far justify the judge ng, that no new trial would be granted; for, the burden of affirmative proof of on them, they adduced no evidence having a preponderance either way, so as to ɔessary to leave it to the jury.

vidence tending to establish a point already supported by more direct proof is im- jected, the Court will not grant a new trial on that ground, if they see that the case have been advanced further by admitting the particular piece of evidence.

release of 16th and 17th April, 1807, between R. I
first part, T. King of the second part, J. Carter
part, and Robert Welsh of the fourth part, Lewi
conveyed to Carter, and to Welsh as his trustee in
other hereditaments in Long Sutton), the prope
S. Langfield, by the same description as in C
sequent mortgage to Lovell, the ultimate limit
to the heirs and assigns of Carter for ever, nev
to the estate and inheritance of Welsh, in trust
his heirs and assigns for ever. Upon this
Carter assumed to be seised in fee of the r
various small houses and lands in Long Sutton
those then possessed by S. Langfield, and was
other lands there. On 21st December, 1807, C
gaged the above-mentioned *reversion*, and the oth
for 2000 years to G. Lovell, to secure £3000,
parcels, and stating them as having been fr
time granted, by copy of court roll, by the lord
the time being of the manor of Sutton Bourne,
Sutton St. Cleers, in the county of Somerset,
severally held by copyhold or customary tenants
manor. Various court rolls were scheduled in t
ginning with 14 Car. 2, but they were not prod
dence. By indenture of 1st August, 1814, L
ferred the mortgage to R. Welsh, who paid him
and got into possession of so much as Carter ha
sessed of. At R. Welsh's death, in 1843, he
his estate to Mary Welsh, who disclaimed and

On 30th September, 1814, an award was made by the commissioners acting under an act for inclosing certain lands in Long Sutton. At this time Sylvester Langfield was in possession of an ancient dwelling-house, garden, and orchard, then called Langfield's, with five old inclosures, all in Long Sutton. He also claimed eleven pieces of commonable land there, which he gave up on receiving five acres in Ridgway, and three acres in Westmead, under the award, in lieu of them. The person who had been surveyor to the commissioners produced S. Langfield's claim under the Long Sutton award, as follows:—

"*Long Sutton.*

"Copyhold lands, late Lewis's, held now under John Carter, by Sylvester Langfield.

"*Windmill Field.*

"1 acre, in Honey Clays."

(Here followed eight other claims of lands in various fields,—in all 11¼ acres, by Sylvester Langfield; signed by him.)

"Mr. Langfield wishes to have an allotment in Crowds."

Indorsed: "Long Sutton Inclosure, Sylvester Langfield's claim, 22nd June, 1810."

"*Copyhold under John Carter.*

By that award, the commissioner thus awarded under the title, "Allotments to John Carter and his tenants:—

No. 388. a. r. p.		
5 0 5	"Allotments to Sylvester Langfield and John Carter.	And I the said commissioner, by virtue of

the power and authority aforesaid, have set out, allotted, and awarded, and by these presents do set out, &c., unto and for Sylvester Langfield as copyholder, and John Carter as reversioner, all that allotment of arable land situate at Ridgway," &c., (describing that allotment and

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another allotment of meadow (at Westmead); adding, that the said two allotments were in the judgment of the commissioner, and should be taken to be, a just and full compensation and satisfaction to them, the said Sylvester Langfield and John Carter, of and for all and singular such parts of their copyhold tenement as consisted of commonable lands, common rights, &c., over the open and commonable lands by the act directed to be divided and inclosed).

The lessors of the plaintiff tendered an examined copy of this award in evidence, to shew that S. Langfield held the properties in respect of which the allotments were made under Carter; and that, at the determination of S. Langfield's interest, they became the property of Carter's assigns. The defendants' counsel objected that the award of the commissioners was res inter alios acta, so far as it declared the title of either Carter or S. Langfield; and that, if admissible at all, all it proved was the allotment in fact, without shewing what term or interest S. Langfield took as copyholder. The award was received in evidence.

By sect. 15 of the Long Sutton Inclosure Act, it was enacted, that all the expenses incident to the obtaining the act, and of surveying, valuing, dividing, and allotting, &c., the lands, should be paid in such shares, parts, &c., as the commissioner should direct; and that the same should be raised by a sale or sales of such part of the commonable lands, &c., as the commissioner should think proper. Sect. 37 of 41 Geo. 3, c. 109, (General Inclosure Act), after providing that all monies to the amount of £50 should be paid to some banker, and not be issued without an order of the commissioners, enacts, that the balance, if any, upon the final settlement of accounts shall be immediately repaid to the landowners in proportion to the sums respectively paid by them. Accordingly, the money requisite for the inclosure in Long Sutton was raised by selling part of the commonable land there; so that each landholder, instead of

paying his share of the expense in cash, received a less allotment of land, and a rateable proportion of the surplus proceeds of the land sold, under a "return rate," so called, which, so far as related to S. Langfield, was as follows:—

"LONG SUTTON INCLOSURE." A RETURN RATE OF SURPLUS MONIES.																	
Proprietors.	*Names of Estate, &c.*	*Value of allotable Arable Land and Meadow in Common.*	*Value of Sedgmoor Land.*	*Possession.*			*Reversion.*			*Total of Monies to be returned,*			*Possessioners' Proportion.*			*Reversioners' Proportion.*	
				£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
Leaseholds: Langfield, Sylvester. 70. [In red ink.]	Carter.			6	10	6	19	0	0	6	10	6	1	11	6	4	19	0

The surveyor of the commissioners produced the above return rate, made by their order, and proved that the sum ordered by it to be returned to S. Langfield was 1*l.* 11*s.* 6*d.*, and to Carter, as reversioner of the same property, was 4*l.* 19*s.* Langfield's 1*l.* 11*s.* 6*d.* was there calculated on his age of seventy, under a 4-per-cent. table, treating his property as lifehold. The parish clerk proved his distribution of £600, the surplus money, according to the entries in the return-rate, and the payment to Langfield of 1*l.* 11*s.* 6*d.*, and to Carter of 4*l.* 19*s.* He produced the following receipt given him by S. Langfield: "Long Sutton, Sept. 22, 1815.

"Received of the Commissioner of the Long Sutton Inclosure the sum of 1*l.* 11*s.* 6*d.*, being my proportion of the surplus monies collected under the said Inclosure Act. (£1 11*s.* 6*d.*) "SYLVESTER LANGFIELD (*a*)."

(*a*) Carter's receipt was in fact as follows, but was not in evidence:—

"Long Sutton, Oct. 19, 1815.

"Received of the Commissioner of the Long Sutton Inclosure, the sum of five pounds and ten shillings, being my proportion of the surplus monies collected under the said inclosure, as reversioner of several estates in the parish of Long Sutton.

(Signed) "JOHN CARTER."

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S. Langfield's age was not shewn to be seventy at this time, nor did it appear that he was shewn to the commissioner to be tenant for life or reversioner.

The counsel for the defendants having objected to the admission of the "return-rate" in evidence, as res inter alios acta, it was answered for the plaintiff, that S. Langfield, by having taken a pecuniary benefit under it, had in truth adopted it, and so admitted that he had only a life interest in the property of which he was in possession, and of which, but for that admission, the law would presume him to have been seised in fee (*a*). That act amounted to a declaration by him, which, being in derogation of his own interest, was therefore admissible for the lessors of the plaintiff.

The learned Baron thought that it should have been proved that the witnesses who had been called had explained to S. Langfield the assumption upon which the sum returned to him had been ascertained, viz. that he was merely tenant for life, and rejected all the evidence offered respecting the return-rate, except the payment and receipt.

The claim of the lessors of the plaintiff was then rested on proceedings under a private act of Parliament, passed for inclosing lands at Kingsmoor, county of Somerset, which passed in 1797. By section 15, for preventing unnecessary delays in the execution of the act, and determining all differences and disputes that might arise concerning any claim or claims which should be made of any right or rights of common, or otherwise in or upon the said lands or grounds, by the act intended to be divided, and allotted, or exchanged, or any part thereof; it was enacted, that all persons having any claim which might affect such boundaries, or any of them, and also all persons claiming any rights of common, leasowes, or rights of pasturage, in, over, and upon the said lands and grounds thereby intended to be divided and ex-

(*a*) See *Jayne* v. *Price*, 5 Taunt. 326; 4 Taunt. 17; Bull. N. P. 103; 2 Tyr. 156.

anged or allotted, or any part thereof, should lay their re-
ective *claims in writing* before the said commissioners, at
eir first or second meeting, to be held in pursuance of this
t; and if such claims, or any of them, should at the first,
ond, or third meeting of the said commissioners be ob-
ted to by any person or persons interested in the division,
change, or allotments thereby authorised, "it shall and
y be lawful for the said commissioners, and they are
reby required, to appoint a day or days to hear the said
ims and objections, and by writing under their hands to
mmon before them, and also to examine any witness or
itnesses on oath touching such claims and objections re-
ectively, which oath the said commissioners, or any of
em, are or is hereby empowered to administer, and to
ear, adjudge, and determine such claims so objected to re-
ectively." The act then provided a reference to arbitra-
on, in case any parties were dissatisfied with the commis-
oners' determination; and then enacted, that "all claims
hich shall not at the first, second, or third meeting of the
id commissioners be objected to as aforesaid, shall be al-
wed and be final and conclusive, and that no claim shall
e received after such first or second meeting." It then
ent on to provide, that in case parties should be dissatisfied
ith the commissioners' determination, and should not con-
ent to refer, &c., they might proceed to trial at the Somerset
ssizes in a feigned action, "between the party or parties
o claiming such right of common on the one part, and the
ersons having right of common thereon, and objecting to
ch claims, or any of them, on the other part; and the ver-
ict in such action shall be final and conclusive, and there-
pon the commissioners shall allow or disallow such claim
r claims, according to the event of such verdict."

The 18th section contemplated the necessity for a strict
vestigation at the time of all the claims made upon
ingsmoor, by giving the commissioners power to appoint

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a general objector to all claims made thereon, and to appoint a day or days to hear such claims and objections, and to summon and examine witnesses on oath, and to hear, adjudge, and determine such claims; and in case any parties were dissatisfied with the commissioners' determination, then that it should be referred to arbitration, or that a feigned action should be tried, the verdict in which was to be conclusive, and the commissioners were to allow or disallow the claims accordingly, precisely as provided in the 15th section of the act, before stated.

Section 27 then required the commissioners, after setting out the allotment in lieu of soil in the said moor called Kingsmoor, and subject to such sale or sales as might be made for defraying the expenses of passing and executing the act as therein mentioned, to set out and allot all the residue and remainder of the said moor called Kingsmoor, and all other the said commonable and waste land, unto, for, and amongst all and every person and persons having been allowed right of common thereon respectively within the meaning of this act, in respect of their several tenements, without any regard to the value or extent of such tenements, it being the intention of the act that every such tenement should have an equal allotment in the said moor, having regard, nevertheless, to the quality, quantity, situation, and conveniency of the same allotments respectively; and that the allotment or allotments to be made in respect of the tenements situate in the parish of Long Sutton, should be contiguous (or as near thereto as possible) to the said parish as the general convenience will admit of.

The survivor of one of two clerks to the commissioners under the Kingsmoor act produced the inclosure award, and that portion of it allotting portions of land to S. Langfield and R. Lewis was read. One of the allotments made under the Kingsmoor Act was awarded in these terms:— "Unto and for the said R. Lewis, and S. Langfield, his

e, in respect of a tenement called 'Late Baunton's;' at allotment or parcel of land, situate in and parcel of gsmoor aforesaid, numbered 33 on the plan C., contain- 3 roods and 8 perches, bounded on the south by the drove, and on the east by the next described allot- t." S. Langfield took possession of this allotment. The ess then proved attending the commissioners' meet- , and seeing the deceased clerk make entries, purport- to be of claims by the commoners, in the commissioners' ok of claims," which he produced. The title of the , and the entry offered in evidence, were as follows:—

er of the CLAIMS delivered to the COMMISSIONERS acting under an Act of Parliament passed in the 37th Year of the Reign of King George the Third, intituled, &c.

...ders ...ing.	No. on the Commissioners' File.	Lease or Copyholders claiming.	No. on the Commissioners' File.	Tenements.	Premises whereon the Claim is made.	Perons in the actual Possession.	Remarks.
...ard ...is, ...q.	38	Sylvester Langfield. The same as 38.	88	Late Banton's, in Long Sutton.	Kingsmoor.	Sylvester Langfield.	Allowed*. J. C. J. T.†
			88	Late Banton's, in Long Sutton.	Kingsmoor.	John Bean Pott. Edw. Hamblin and others.	Held under Rd. Lewis. Allowed. J. C. J. T.†

[* Red ink.] † These were proved to be initials of Commissioners.

he word "allowed," in red ink, opposite S. Langfield's n, was in the deceased clerk's handwriting, to which the als of the commissioners were annexed. The witness never personally seen the original claims, but proved a tless search for them in the drawer where all the inclo- papers which had been preserved were kept. The com- ioners had acted on the book in making allotments. It contended for the lessors of the plaintiff, that the search been sufficient to let in the book as secondary evidence he claims; *Kensington* v. *Inglis* (*a*); for as the parties

(*a*) 8 East, 273.

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entitled were required by section 15 to make claims before any allotment could be made to them, they must be taken to have done so. The evidence was tendered in order to shew that S. Langfield claimed to be entitled to an allotment under the intended inclosure of Kingsmoor, in respect of an estate at Long Sutton, called "Late Banton's," held by him under R. Lewis. The learned Baron said that nothing proved that the commissioners might not have adjudicated without any claim, in which case the entry would stand no higher than the notes of an arbitrator, and was no admission by S. Langfield that his estate in "Late Banton's" was less than a fee; and he accordingly rejected the book. It was then shewn that one Hamblin, about 1799, held some of S. Langfield's land in Long Sutton; and that on some discussion between them, Langfield, speaking of the land which Lewis had had, and which Carter had bought of him, said he, Langfield, had it "by life interest" under Carter. It was contended that this declaration of S. Langfield rebutted the presumption that he held in fee: *Doe* d. *Human* v. *Pettett* (*a*). The identity of the tenement formerly called "Banton's" and the premises sued for, was proved by a witness born in 1768, who also swore that S. Langfield never had any other property in Long Sutton. For the lessors of the plaintiff it was said, that, the defendants in possession being the widows of S. Langfield and of his eldest son, their privity of estate made his declarations evidence against them. The learned Baron said that the declarations did not necessarily apply to an estate for his own life only, but might well mean an estate enduring after his death for the lives of others: and he directed a nonsuit, saying that the lessors of the plaintiff had failed to shew that the reversion in fee, which, as representing Carter, they claimed in the premises sought to be recovered, had vested

(*a*) 5 B. & Ald. 223; see *Slatterie* v. *Pooley*, 6 M. & W. 664.

them in possession on the death of S. Langfield, by the determination of some single particular estate.

A rule having been granted to set aside the nonsuit, and for a new trial on the ground of the rejection of evidence,

Butt and *Moody* shewed cause.—[*Parke*, B.—The whole question was, whether S. Langfield's estate was for his own single life or not. Unless the lessors of the plaintiff proved that, it was clear they could not recover.] They said that this property was only held by copy of court roll; but, though representing the lord of the manor of Long Sutton, they did not produce the court rolls scheduled in the deed of 1807, to shew what S. Langfield's interest was, or whether it had ceased. [*Parke*, B.—The amount of this interest, if copyhold, was not shewn to be less than a fee.] The conveyance of 1807 is consistent with the supposition, that in the ten years since the passing of the Inclosure Act of 1797 the copyhold had been granted in fee. Next, the "book of claims" under the Long Sutton inclosure act was not even secondary evidence. It consisted not even of copies of the original written claims, made by a deceased clerk of the commissioners, which might be acts in the course of his duty, or against his interest, and therefore evidence against third persons, within the decisions in *Doe* d. *Patteshall* v. *Turford* (*a*) and *Poole* v. *Dicas* (*b*); but it consisted of notes, forming an abstract or summary of the contents of the claims, originally made in writing, according to the act. To make these entries evidence, it was essential to shew them to have been made contemporaneously with the time at which they purported to be made, viz. in the clerk's lifetime. That is established in *Price* v. *Lord Torrington* (*c*), as explained

(*a*) 3 B. & Adol. 890. Recognised in *Poole* v. *Dicas*, 1 Bing., N. C., 649; and *Brain* v. *Preece*, 11 M. & W. 773, but not to be extended further; *Marks* v. *Lahee*, 3 Bing., N. C., 408.

(*b*) 1 Bing., N. C., 650.

(*c*) 1 Salk. 285; 2 Ld. Raym. 873; Holt's R. 300; Bull. N. P. 890, 898.

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by *Parke*, J., in *Doe* d. *Patteshall* v. *Turford* (*a*). Nor could this book be primary evidence; for it did not embody the original claims marshalled together, and was not a public book required by the act as a foundation for the award, but mere private notes made in aid of the commissioners as arbitrators. Nor did it mention anything about the land being copyhold. [*Alderson*, B.—Where the usage of business varies from time to time, nothing can be inferred from it. Does not the expression, "usual course of business," mean the usual course in contradistinction to what is out of it; so as to exclude any inference that what is not commonly done was done in the particular case?] Then the "return-rate" was properly rejected, as res inter alios acta; for it was not a rate which the commissioners were called on by the act to make, nor was it brought home to the knowledge of S. Langfield. The bare fact of returning certain sums to the landowners does not make the rate other than a mere private calculation for guidance of the commissioners. [*Parke*, B. assented. *Alderson*, B.—The lessors of the plaintiff sought to shew by this document that S. Langfield knew that he was there set down as seventy years old, and as being only tenant for life under Carter, so as to divide the property between them, giving S. Langfield a proportion calculated on his life interest at seventy. Had there been a reasonable inference of its being known to and assented to by him, it might have been strong evidence for the jury. *Parke*, B.—The receipt itself cannot be excluded; but it is not equivalent to any statement by S. Langfield, that the total returned rate is £6 and upwards, of which 1*l.* 11*s.* 6*d.* was his proportion, and the rest Carter's. *Rolfe*, B.—The receipt is quite consistent with the estate of S. Langfield being in fee.] Taking the estate to be copyhold, it was for the lessors of the plaintiff to shew a declaration by S. Lang-

(*a*) 3 B. & Adol. 898.

field, cutting down not only his own copyhold interest, but every other such interest intervening between himself and Carter, the reversioner.

Crowder, Cockburn, and *Prideaux,* in support of the rule. —The question was, whether the estate of the lord in reversion had come into possession of the lessors of the plaintiff. [*Parke,* B.—It was rather, whether all the mesne interest of the copyholders or others had determined.] The declarations of S. Langfield were evidence for the jury to say whether they admitted his having only an interest for his own life. [*Parke,* B.—His declaration was primary evidence in one sense (*a*), and therefore admissible; but it lets in the objection, that no evidence of the defendant's title was conclusive except the court roll. Taken at the utmost, the expressions used do not exclude other copyhold estates in remainder. In order to let in the lord's title as ultimate reversioner, and to shew his right to immediate possession as such, it was for the lessors of the plaintiff to prove that no copyhold interests besides S. Langfield's existed after his death. His expression as to Carter does not prove that, or carry it further. *Poole* v. *Dicas* (*b*) does not apply, for the claim is not under S. Langfield. There is a covenant in the deed of 1807 to produce the court rolls there scheduled, and no negative search for them in the proper depository was shewn. The principle of the case is, whether this document signed by S. Langfield is tantamount to his saying "I am entitled for life, and the immediate reversioner is Carter." What the commissioners say about that in the award is immaterial.] It is sufficient for a new trial if there was any evidence for the jury which was not left to them. *Tyrwhitt* v. *Wynne* (*c*), and *Doe*

(*a*) See Best on Presumptions of Law and Fact, 35, post, 573, n.
(*b*) 1 Bing., N. C., 649.
(*c*) 2 B. & Ald. 559. See 3 East, 451; 2 Moore, 153; 2 B. & Ald. 277.

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d. *Teynham* v. *Tyler* (*a*), which seem to the contrary, were overruled as to this point in *Crease* v. *Barrett* (*b*). Now this document shews that no one but S. Langfield and Carter claimed anything in respect of this property. [*Alderson*, B.—No; it goes no further than saying that Carter had some ulterior interest in it. No part of the evidence is inconsistent with S. Langfield's having held for the life of a third person who may be yet alive. As to the rule, that evidence must go to the jury, they are not to be required to act in the dark, without grounds. Something must preponderate, or there is in truth nothing to go to them. *Parke*, B.—The reason why a grant to a man for life is taken to mean for his own life, is because it is taken most strongly against the grantor; so that if the grantor is only tenant for life, the grant is for his own life; for he can grant no more; and if he outlives the grantee, there will be special occupancy during his own life. Such grants operate according to the interest possessed by the grantor.] *Stagg* v. *Wyatt* (*c*) was an action of replevin. Rent was acknowledged to have been paid down to 1821. It was held by *Tindal*, C. J., that it must be left to the jury to presume, if they would, that the tenancy had determined between that year and 1836. [*Platt*, B.—There the onus of proof was not on the plaintiff, as in this case, but on the avowant, on the issue of non tenuit. *Parke*, B.—S. Langfield's expression, that he held for "life interest," is primâ facie to be construed, that he held either for the highest or the lowest interest those words will convey. If it is ambiguous, and may mean an estate for another person's life and his own, or for a long term of years, determinable with his own life and that of another, the lessors of the plaintiff have no case. If it means, for his own life, or for the greatest life

(*a*) 6 Bing. 561.
(*b*) 5 Tyr. 458; 1 C., M., & R. 919.
(*c*) 2 Jur. 892.

field, cutting down not only his own copyhold interest, but every other such interest intervening between himself and Carter, the reversioner.

Crowder, *Cockburn*, and *Prideaux*, in support of the rule. —The question was, whether the estate of the lord in reversion had come into possession of the lessors of the plaintiff. [*Parke*, B.—It was rather, whether all the mesne interest of the copyholders or others had determined.] The declarations of S. Langfield were evidence for the jury to say whether they admitted his having only an interest for his own life. [*Parke*, B.—His declaration was primary evidence in one sense (*a*), and therefore admissible; but it lets in the objection, that no evidence of the defendant's title was conclusive except the court roll. Taken at the utmost, the expressions used do not exclude other copyhold estates in remainder. In order to let in the lord's title as ultimate reversioner, and to shew his right to immediate possession as such, it was for the lessors of the plaintiff to prove that no copyhold interests besides S. Langfield's existed after his death. His expression as to Carter does not prove that, or carry it further. *Poole* v. *Dicas* (*b*) does not apply, for the claim is not under S. Langfield. There is a covenant in the deed of 1807 to produce the court rolls there scheduled, and no negative search for them in the proper depository was shewn. The principle of the case is, whether this document signed by S. Langfield is tantamount to his saying "I am entitled for life, and the immediate reversioner is Carter." What the commissioners say about that in the award is immaterial.] It is sufficient for a new trial if there was any evidence for the jury which was not left to them. *Tyrwhitt* v. *Wynne* (*c*), and *Doe*

(*a*) See Best on Presumptions of Law and Fact, 35, post, 573, n.

(*b*) 1 Bing., N. C., 649.

(*c*) 2 B. & Ald. 559. See 3 East, 451; 2 Moore, 153; 2 B. & Ald. 277.

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Kingsmoor Inclosure Act. By s. 10, there could have been no allotment unless an original claim in writing existed. [*Parke*, B.—Taking that to be so, is this entry a copy made in course of business, or against the clerk's interest? The act did not direct such a book to be kept; and it contains no public matter. In *Poole* v. *Dicas*, the deceased clerk charged himself with the noting of the bill.] In *Doe* d. *Patteshall* v. *Turford* (*a*), it was proved to be usual for the clerk to make the entry, and not for the partner, which makes the admission in that case of the entry by the deceased partner, stronger than that here contended for. [*Parke*, B.—*Chambers* v. *Bernasconi* (*b*) was distinguished, on the ground that putting down the place of arrest on the writ was not part of the official duty of the arresting officer.]

Cur. adv. vult.

Parke, B., now delivered the judgment of the Court.—There were two questions in this case: first, whether the learned Baron was right in refusing to suffer the case to go to the jury, on the ground that the lessors of the plaintiff had failed to make out their claim; and secondly, whether any evidence was improperly rejected at the trial. We are all of opinion that the learned Baron was right in directing a nonsuit. The lessors of the plaintiff claimed under a mortgage of premises therein recited to be held by copy of court-roll. Their claim was as reversioners, subject to certain copyhold interests. It was therefore necessary for them to clear their title of those interests, by shewing them to have determined. It was suggested that it was necessary for them to shew that determination by producing the copies of court-roll. But, on consideration, we are of opinion that it was competent to the lessors of the plaintiff to shew by

(*a*) 3 B. & Adol. 890. How recognised, see p. 507, note (*a*).

(*b*) 1 Tyr. 335; S. C. in error, 4 Tyr. 531.

idence that the copyhold terms were at an end. Ac-
;ly, if any person in possession of the premises
that his interest in them was for his single life
hat would be evidence sufficient to raise a presump-
at the outstanding copyhold term ended with his
Nor was this mere secondary evidence inadmissible
nt of negative search for the original deeds. Mr.
valuable work on *Presumptions of Law and Fact* (*a*)

n p. 35 is this passage:
mptive evidence is not, in
ense, inferior or secondary
:t evidence. (Rosc. Civ.
5, 2nd ed.) By the rule of
ch declares certain species
:nce inferior or secondary
s, and requires the best or
r evidence to be given, is
not that some kinds of evi-
e to be rejected as less con-
or credible than others,
t no evidence shall be re-
which shews on its face
nly derives its force from
:her which is withheld.
y cases the law has appro-
certain kinds of evidence
proper proof of certain
thus, a will or contract re-
writing should be proved
production of the docu-
itself; the records and
proceedings of courts of
are the proper proof of
ts therein recorded, &c.;
which cases any evidence
or presumptive, deriving
from the will, contract,
&c., such as copies, ex-
or the recollection of wit-
are rejected as secondary;
t. liv. 3, tit. 6, s. 2, n. 10.
Rosc. Crim. Evid. 1, 2; Gilb. Evid. 94;) and not receivable till the absence of the primary evidence under which they derive their force is satisfactorily accounted for. So, the production of a written document itself is the best or primary evidence of its contents, when those contents are in issue. (*Queen's case*, 2 B. & B. 286, by the judges.) But except in these and some few other instances, no evidence relevant to the issue, and, à fortiori, no evidence which carries a presumption of truth with it, will be rejected on the ground that written evidence, or evidence of a more direct or satisfactory kind, might have been procured. Thus, the payment of money may be proved by a witness who saw the payment made, although a written receipt was given at the time. (*Rambert* v. *Cohen*, 4 Esp. 213). And a verbal demand of goods may be proved though there was also a demand made in writing. (*Smith* v. *Young*, 1 Camp. 439). And it has been lately settled, after a long series of irreconcilable rulings at Nisi Prius, that admissions against interest, made by a

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clearly shews that though it be only a presumption, and not evidence of the contents of the court-rolls, it would from its own nature be good original or primary evidence in itself. All statements made by a deceased person while in possession of property are in themselves original evidence, if they go to cut down his interest in it. This objection to the admissibility of S. Langfield's declarations, irrespective of the court-rolls, having been disposed of, it appears to us that the claim put in by him was sufficient to shew that he was entitled to some interest, and that Carter was the immediate reversioner. But as that did not shew the nature and extent of S. Langfield's interest, it was sought to be supplied by his vivâ voce declaration, viz. that he held the premises "by life interest." Had he said that he held "for his own life," that would have been evidence for the jury; but the actual expression might mean his own life, or that of another, or his own life with that of another. That was ambiguous, without anything to strike the balance either way in the ordinary sense of the words, nor was any usage of the neighbourhood proved as to the meaning of the words used. We are therefore of opinion that, the burden of affirmative proof lying, as it did, on the lessors of the plaintiff, the evidence in question was not such as should have been left to the jury.

The next question is, whether evidence was improperly

party to a suit, are receivable as *primary* evidence against him, even though they relate to the contents of instruments of the most solemn kind; for such evidence is not secondary in its character, and has the presumption in favour of its truth, arising from the admissions being prejudicial to the party making it. (*Slatterie* v. *Pooley*, 6 M. & W. 664; *Howard* v. *Smith*, 3 Scott, N. R., 574.) For these reasons, it may be laid down as a rule, that it is in general competent to prove any fact by presumptive, as well as by direct evidence, (Rose. Crim. Evid. 15, 2nd ed.,) although the withholding the latter may be ground for observation. (2 Ev. Pothier, 340; Theory of Presumptive Proof, 62)."

rejected. First, a document called a "return-rate" was offered in evidence, by which it was sought to shew that a sum of money calculated on S. Langfield's interest in the property, being for his own life only, had been received by him under this rate; but that did not advance the case, unless it were shewn that he had claimed in respect of his interest as for his own life only, for there was no reasonable ground to infer that this rate, or the grounds upon which the amount of payment to him under it had been calculated, had ever come to his knowledge. The learned Baron therefore properly held that he could not admit the return-rate in evidence.

The last question is, whether the book of claims should have been received as secondary evidence of the original claim made in writing, to shew an admission by S. Langfield that his was a life estate. We are very much inclined to think that this book should not have been rejected at the trial, for the original appeared to be lost. The initials of the commissioners, affixed to the entry produced, afforded ample evidence of its existence at the time at which it purported to be written, and it was made in the course of business by a person whose death was proved; but, if received, it would have not advanced the case of the lessors of the plaintiff, or altered the defendant's position, for its object had been better proved before by S. Langfield's declaration in 1810, limiting the nature of his interest. We shall therefore act on the judgment of the Court in *Crease* v. *Barrett* (*a*). The Court there says, that the authority of *Doe* d. *Lord Teynham* v. *Tyler* (*b*) had been quoted to shew that the Court had a power to refuse a new trial, if evidence had been improperly rejected which in their judgment ought to have no effect, there being enough to warrant a verdict against the party

(*a*) 1 C., M., & R. 919; 5 Tyr. 458, 475.
(*b*) 6 Bing. 561.

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offering the evidence, supposing it to have been admitted; and that something to the same effect had fallen from Sir *James Mansfield*, in *Harford* v. *Wilson* (*a*), and from Lord *Tenterden*, in *Tyrwhitt* v. *Wynne* (*b*). After saying that the rule is there laid down much too generally, they proceed to state that "in some cases no doubt a new trial may be refused, when a witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed; *Edwards* v. *Evans* (*c*); or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been manifestly against the weight of evidence, and *certainly* set aside on application to the Court as an improper verdict." In this case, had the book of claims been admitted to shew S. Langfield's claim in 1797, in the terms stated in it, it would not have advanced the case of the lessors of the plaintiff: for the same person's declaration by way of like claim in 1810 would have been a much stronger piece of evidence in their favour. Then, no evidence having been improperly rejected but such as was immaterial, and, if admitted, would not have prevented a nonsuit, we think the result should not lead to a new trial. The circumstances do not carry the case so far as *Crease* v. *Barrett*, or the cases there referred to.

Rule discharged (*d*).

(*a*) 1 Taunt. 14.

(*b*) 2 B. & Ald. 559.

(*c*) 3 East, 451. See *Nathan* v. *Buckley*, 2 Moore, 153; *Rutzen* v. *Farr*, 4 Adol. & Ell. 53; also 4 M. & W. 314.

(*d*) See *Hughes* v. *Hughes*, 15 M. & W. 701; and the next case.

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DOE *d.* CHIDGEY *v.* HARRIS and Wife.

Feb. 16.

EJECTMENT for three dwelling-houses in Bristol. At the trial, before *Erle*, J., at the Bristol Summer Assizes, in 1846, the plaintiff claimed as heir-at-law of Robert Chidgey. The defendants proved that, in 1827, Robert Chidgey, being in possession of the houses in question, made his will, and devised them to Cross and Rossiter, upon trust to sell the same, and apply the proceeds of the sale in payment of legacies, of £50 each, to the Bible and Church Missionary Societies, and the Bristol Infirmary. After giving various legacies to other persons, he made his brother, Thomas Chidgey, residuary legatee; and having, by a codicil, substituted him for Rossiter as executor, died shortly after. The defendants were in possession as tenants to the cestui que trusts under the will. In reply to this case, the plaintiff put in a deed, executed by Cross and the heirs of Rossiter sixteen years after the testator's death, by which they rejected and disclaimed all the property bequeathed and devised by the will, together with all the trusts thereof. The defendants then, by way of rejoinder, and in order to shew that before the deed of disclaimer had been executed Cross had assented to the devise, gave evidence that, during the reading of the testator's will after his death, Cross said, "I ought to have had £5 for being trust." The plaintiff, upon this, contended that this expression was no evidence that Cross had assented to act as executor; but the learned Judge held the contrary, and left it to the jury whether Cross so assented or not. The jury found that he had, and gave a verdict for the defendants, leave being reserved to move to enter a verdict for the plaintiff.

A testator devised houses to trustees upon trust for sale, and to apply the proceeds to pay legacies of £50 to each of three charitable and religious institutions. He also gave legacies to other persons, and made his brother residuary legatee:—*Held*, that the trust estate was not avoided by the statute of Mortmain, 9 Geo. 2, c. 36, though the houses went to the heir-at-law, and not to the charitable uses. At the reading of the testator's will, soon after his death, the devisee in trust said "he ought to have had £5 for being trust." *Held*, that these words were so equivocal and ambiguous, that they should not have been left to the jury as proving his assent, as a trustee, to the devise.

Quære, whether an unambiguous assent to a devise, expressed by words or matter in pais, without deed, is sufficient?

Quære, whether a devisee in trust can disclaim by deed after previous assent to the devise in words?

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In Michaelmas Term, 1846, *Manning*, Serjt., mov cording to the leave reserved, on two grounds: first there was no evidence of any assent by Cross, as exe to the devise; secondly, that if there was, the stat Mortmain, 9 Geo. 2, c. 36, so far avoided that part will by which an estate was given to parties in trust, render it ineffectual to pass any estate to them. In *Burdett* v. *Wrighte* (*a*), a testatrix seised in fee, after ch her estate with payment of an annuity, devised it to his heirs and assigns for ever, adding her wish and to be, that the said G. S. should, in his lifetime, c the estate to some charitable uses, to take place at his and not before. This was held a devise within the view of 9 Geo. 2, c. 36, which avoided not merely the but also the estate given; so that on the death of without executing any conveyance protected by the st the legal estate descended to the heir-at-law. It i necessary to contend that more of the will than t mitation to the charitable use is void: *Doe* d. *Tho* v. *Pitcher* (*b*).—He mentioned *Gravenor* v. *Hall Attorney-General* v. *Ward* (*d*), *Arnold* v. *Chapm* [*Pollock*, C. B.—As to the last point, suppose a m devise land in strict settlement to relations, and a direct £5 to be paid to an hospital, can the trust est the land be avoided? On the other ground a rul be granted. *Parke*, B.—In the 3rd edition of Pow Devises, by Jarman, pp. 20, 21, it is said, that if pa devise is charitable and part not, but the two obje inseparably connected, the devise is void; but if nected, the will may be good for that part which is and bad for the part which is bad. That is borne effect by the *Attorney-General* v. *Ward*. *Alderson* The judgment of Lord *Hardwicke*, in *Arnold* v. *Ch*

(*a*) 2 B. & Ald. 710.
(*b*) 6 Taunt. 359.
(*c*) Amb. 643.
(*d*) 3 Ves. 327.
(*e*) 1 Ves., sen., 108.

supports that view of this case. *Rolfe*, B.—*Gravenor* v. *Hallum* merely decided that so much of the estate as was given to charitable uses would go, not to the devisees, but to the heir-at-law. Here, as in *Doe* v. *Wrighte*, the heir-at-law takes that which was meant for a charity.] The rule was refused on this point, and granted on the other.

Crowder and *Barstow* now shewed cause.—There was some evidence of assent; so that the whole question is reduced to this, whether Cross had in point of fact assented, or meant to assent to the devise, so as to accept the office of trustee; for if he had, his subsequent disclaimer made no difference (*a*). That was for the jury. Slight evidence of assent to a devise is sufficient (*b*); and there seems no reason why Cross should not have assented. Must the disclaimer by deed, made sixteen years after testator's death, necessarily operate for want of affirmative proof of assent in the meantime? Whether he assented or not he took the legal estate. [*Rolfe*, B.—Though primâ facie a man is presumed to assent to a devise to him, yet his disclaimer strips him of the legal estate, and throws on the other side the burden of proving that he had previously assented. Here a burden was imposed on Cross, without any personal benefit. Did his words amount in substance to more than this—"I am named a trustee, and ought to have had £5 for being so?"] He does not object to the burden of the trust, though he says he should have had £5. His mental acquiescence is enough, without any act. [*Alderson*, B.—As soon as we decide that it lies on you to shew affirma-

(*a*) See Shep. Touchst., by Preston, 7th ed., 70. So, had he disclaimed, he could not afterwards assent, Id.; 4 Leon. 207; *Townson* v. *Tickell*, 3 B. & Ald. 31. The coverture and infancy of devisee or grantee alters the case. See Shep. Touchst., by Preston, 70.

(*b*) But see Williams on Executors, 2nd ed., 985.

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tively that the devisee in trust assented, the case falls within the rule we have lately laid down (*a*), that where an expression is ambiguous, and applies equally to either view of a question, it is no evidence at all for the jury. A man in the position of a devisee in trust has a clear power to disclaim; then the deed of disclaimer throws it on you to shew that he has not exercised that power. *Parke*, B.—By law the estate devised vests in the devisee before assent (*b*); accordingly, in this case, Cross took the legal estate by the devise to him; it was therefore for the jury to say, whether he had disclaimed taking it within a reasonable time after the testator's death, and his own knowledge of the devise. Here, however, it went to the jury that he had precluded himself from disclaiming by previous assent. *Rolfe*, B.—Probably a disclaimer by deed was superfluous; else it would be in the power of a stranger, by devising to a man in trust, without conferring on him any benefit, to compel him to assent to the devise, or incur the expense of preparing a deed of disclaimer in order to free himself from it. Though it has been held that a disclaimer of an estate in fee need not be by matter of record, as was formerly held in *Townson* v. *Tickell* (*c*), it has never been settled that such disclaimer must be by deed; and in the case mentioned, *Holroyd*, J., was of opinion that it need not. The point was left undecided in *Doe* d. *Smyth* v. *Smyth* (*d*). *Parke*, B.—A disclaimer of a tenancy from year to year may be by matter in pais. Mr. Preston, in the 7th edition of Sheppard's Touchstone, p. 285, inserts this passage: "The law presumes that every grant, &c. is for the benefit of the grantee, &c.; and therefore, till the contrary is shewn, supposes an agreement to the grant.

(*a*) *Doe* d. *Welsh* v. *Langfield*, ante, p. 497.

(*b*) See Co. Lit. 111. a.; *Butler* and *Baker's case*, 3 Co. 26.

(*c*) 3 B. & Ald. 31. See *Nicholson* v. *Wordsworth*, 2 Swanst. 365; and 3 East, 410.

(*d*) 6 B. & C. 112.

rom the moment there is evidence of disagreement, then, construction of law, the grant is void ab initio, as if grant had been made (citing *Thompson* v. *Leach* (*a*)), d in intendment of law the freehold never passed from e grantor." The original text of the Touchstone then oceeds: "And before agreement the grantee may waive and so avoid the estate and the deed also whereby the tate is made. And if it be but a lease for years that is ade, he may waive and avoid that by word of mouth in e country (viz. in pais), as well as a gift of goods, or an ligation delivered to his use (*b*). But if it be an estate freehold that is made by feoffment, &c., it seems he nnot waive and avoid that but in a court of record." r. Preston adds, "this conclusion is too general," and fers to 21 H. 8, c. 4, and Lord *Loughborough's* opinion in *reme* v. *Dicken* (*c*). This is strong to shew that a man may sclaim even an estate by word of mouth. Here the uestion is, did he in fact disagree?] During the sixteen ears which followed the testator's death, the legal preumption would be that he assented. In *Doe* d. *Smyth* v. *myth* (*d*), Lord *Tenterden* says, "It is clear that a deised interest vests in the devisee by presumption of law, efore entry: Co. Litt. 111. a. It may be admitted that a evisee cannot be compelled to accept the devised interest, ut may by *some* mode renounce and disclaim it, and that pon such renunciation or disclaimer it will descend to the eir, or pass to a remainderman. And it is not necessary

(*a*) 2 Vent. 198; 3 Mod. 296; hower, 307. The decision of e majority of three judges reersed, and that of *Ventris*, J., firmed; S. C., Dom. Proc. 15 ords' Journals, 163. See anher case between same parties, Salk. 618.

(*b*) In 4 M. & Ryl. 191, note, Serjt. Manning quotes Year Book, M. 7, E. 4, fol. 20, pl. 21, as contrary. See per *Gould*, J., 1 Salk. 301, *Wankford* v. *Wankford*.

(*c*) 4 Ves. 97.

(*d*) 6 B. & C. 112. See cases collected in the reporter's note, 4 M. & Ryl. 189.

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in the present case to decide whether such renunciation and disclaimer may be by parol, because in whatever form they are made, we think there must be a clear and unequivocal disclaimer of any estate in the land." Before this rule can be made absolute, the Court must say there is no evidence whatever of assent, or that it is so ambiguous as to be not only slight but insensible.

Manning, Serjt., and *Ball*, contrà.—First, the words used did not import assent; and secondly, if they did, a mere verbal assent to a devise, without some act of dealing with the estate (*a*), will not take away the devisee's right to disclaim. On the first point it is sufficient to say, that as the words used might mean that he refused the office of trustee, they were at least not sufficiently unambiguous to be left to the jury as evidence that he accepted it (*b*). Though a legal estate may equally pass by devise, whether the devisee takes a benefit or only a burdensome trust under it, his actual position in those respects must be taken into consideration, in construing his expressions to imply his assent to the devise or the contrary. [*Parke*, B.—The cases put in Sheppard's Touchstone, by Preston, p. 70, as to disagreement in case of obligations delivered as escrows, or on certain conditions, leave the question open what agreement or disagreement is. Assent to a bond might be by placing it among the party's muniments.] No point as to disclaiming in reasonable time was taken at the trial. [*Parke*, B.—My doubt has been, whether Cross's lying by for sixteen years without disclaiming had not some bearing on the question whether he meant to assent, so as to enable the jury to strike a balance, by taking into consideration his verbal expressions on the sub-

(*a*) See *Doe* d. *Mabberley* v. *Mabberley*, 6 C. & P. 126; *Young* v. *Holmes*, Stra. 70.

(*b*) See Williams' Executors, 2nd ed., 985.

may be, that if he did not mean to assent he ıve disclaimed sooner. *Rolfe*, B.—The rule was ed as for misdirection, but on the point whether ɜ evidence to go to the jury at all.] On the ɔint, it appears from *Butler* and *Baker's case* (*a*), ɾerbal waiver or disagreement in pais is of any law to devest a freehold; for the law doth more ı act, e. g. of entry on land and taking the profits ɾords, than words, e. g. of waiver and disagree- such an estate without an act: "for the law doth eeds; but words without an act are not in this rded in law, as it is adjudged in M. 34 Ed. 1, 232, that if a man takes a distress for one thing, he comes into a court of record he may avow for ıg he pleases." Lord Coke goes on to cite the k (*b*), 17 Edw. 3, fol. 6, pl. 18, thus: "The husband is land, and took back an estate to him and his il. The husband died, and the lord, of whom the held by knight's service, supposing the husband seised, by word assigned dower to the wife, which ted; yet it was adjudged that this refusal of the inheritance, and acceptance of her dower in pais, t devest the freehold out of her (*c*)." [*Parke*, B. ting 100 shillings in lieu of dower was, in truth,

p. 26 a.
lso Vin. Abr., tit. Dis- A., pl. 11, 13; 4 M. &

ppears from the Year she took 100 shillings hat which she held. found that she did not wer by deed, and did ɜ by any deed her ıe two other parts of anted to her husband f in tail, and on de-

mand of them if she was disseised, "disoient q' oile." Afterwards, at Westminster, to which Shard, before whom the assize of novel disseisin had been tried at Canterbury, adjourned it, what is called in the margin the "judicium," is "Sh. (*semble Shard*): Nos. avo- ple a tout le counsell et lour semble q. el' n' ẽ p̄. barrable. Per q̄. ag. l' ass. q. el' rec̄. sa sein," &c. (that she should recover her seisin, &c.

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entering on the estate in respect of dower. No act was done to determine her election. She might take the 100 shillings in the impression that it was part of the profits of the estate; so that the receipt of that sum was an equivocal act. *Rolfe*, B.—I do not understand it. She entered under the estate in dower. The claim of one-third of White acre did not conclude her as to Black acre.] It does not appear whether she had notice at the time of paying the 100 shillings that she was entitled to the whole estate. The case goes further than is necessary to be contended here. Again, Co. Litt. 245. b. lays it down, that "acts without words may make an entry, but words without an act (viz. entry into the land, &c.) cannot make an entry." At all events, there should be a new trial, for the words were assumed to be sufficient to prove assent by the devisee.—Fitzherbert's Abridgment, tit. Joint Tenancy, pl. 9, and Brook's Abridgment, tit. Disclaimer, pl. 2, were also cited.

Parke, B.—There is no authority but *Butler* and *Baker's case* for saying that a verbal assent to a devise is insufficient; but that case does not clearly apply. It is not necessary to decide the point; for we all think that Cross's expressions were so ambiguous, that they ought not to have been left to the jury as evidence importing his assent to the devise. Unless there was unequivocal evidence of assent, the subsequent disagreement by deed of disclaimer would avoid the estate quoad hunc. The consequence would be to avoid the will, as to him, ab initio, and vest the legal estate in Rossiter, so that, as his heirs have disclaimed, it would revert to the heir-at-law of the testator.

Alderson, B.—All that is proved here is consistent with there not being an assent by Cross to the devise.

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ROLFE, B.—I do not understand *Butler* and *Baker's case* to this point. The question in the case in the Year ooks was, whether the wife was entitled to the whole tate, or only to a third of it as dower. She actually ceived 100 shillings in consideration of her right to ower, and so made her election, and yet her act and eclaration were held not to bind her.

Rule absolute for a new trial (*a*).

(*a*) See 21 H. 8, c. 4; *Crewe* v. *Dicken*, 4 Ves. jun. 97; *Adams* v. *Taunton*, 5 Madd. 435.

HAIGH and Another *v.* JOSEPH and JOHN JAGGAR.

Feb. 12.

A deed, which may operate either at common law or under the Statute of Uses, cannot, in pleading, be relied on as operating under the statute, unless an election that it shall so operate is expressly averred; and *quære*, whether an entry under such a deed is not conclusive of an election that it shall operate at common law.

TRESPASS for breaking and entering a coal mine or vein f coal of the plaintiffs, lying under certain closes, pieces, r parcels of land or ground named, and digging coals there. Second count, for carrying away coals. Third plea to the irst count stated, that one John Sykes, before the making f the indenture thereinafter mentioned, and long before he said times when &c. in the declaration mentioned, r any of them, and long before the plaintiffs had anything n the said coal mine, or vein of coals in which &c., to wit, n 27th September, 1804, was seised in his demesne s of fee of and in the said several closes &c. respectively in the first count mentioned, and of the said coal ine or vein of coals, situate, lying, and being under the

Semble, under a grant to A., B., and C., their *executors*, &c., of liberty to get the coal under rticular closes till all the coal should be gotten, an interest passes to the executors of the survor, provided the deed operates under the Statute of Uses.

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said several closes, &c., in that count mentioned, and being so thereof seised, before the said times when &c., or any of them, to wit, on &c., by a certain indenture then made between the said J. Sykes of the one part, and Joseph, Matthew, and James Jaggar, in the said indenture mentioned, of the other part (profert of the indenture), the said J. Sykes did, for the considerations in the said indenture in that behalf mentioned and set forth, and for settling and barring all future and other payments more than a certain sum, to wit, £420, for a certain portion of the said coals under the said closes, &c., to wit, six acres of the said coals after the rate of £70 per acre, to be paid by portions as in the said indenture mentioned, among other things, by the said indenture, for himself, his heirs, executors, administrators, and assigns, grant to the said Joseph, Matthew, and James Jaggar, their executors, administrators, and assigns, for and notwithstanding anything thereinbefore or thereinafter in the said indenture contained to the contrary, from and after the commencing of and digging and sinking of any pit or shaft for the sale of coals, in the said closes in the said indenture mentioned, whereof the said closes, pieces, or parcels of land or ground in the first count of the declaration mentioned are parcel, the liberty and privilege of getting, selling, winning, and working the said coals or mines in the said indenture mentioned, being all the coal mines, veins, and seams of coal of him the said J. Sykes, then lying or being within or under the said closes in the said indenture mentioned, whereof the closes, &c. in the first count mentioned are parcel, in as large, ample, and beneficial a manner to all intents and purposes whatsoever as the said J. Sykes could settle and assure the same, for any term or terms of years, computing the same from such time as they the said Joseph, Matthew, and James Jaggar, their executors, administrators, or assigns, should so begin to sink as aforesaid, until the said quantity of six acres of

coals should be gotten; and at the expiration of the term of twelve years, then that the said coals should be fairly measured, at the joint expense of the said parties to the said indenture, and upon such admeasurement being taken, if the full quantity of six acres of coals should not be then gotten, then that the said Joseph, Matthew, and James Jaggar, their executors, &c., should have liberty to get the remainder of the said six acres of coals, and that when all the said quantity of six acres of the said coals should be gotten in a workmanlike manner, then that *the said getting and selling the said coals should be carried on as aforesaid, until such time as all the coals in the said closes,* being the said closes in the said indenture mentioned, and whereof the said closes, &c. in the first count mentioned are part and parcel, *should be gotten and disposed of,* the said Joseph, Matthew, and James Jaggar, their executors, &c., paying or causing to be paid to the said J. Sykes, his heirs and assigns, for every acre of coals to be gotten, over and above the aforesaid quantity of six acres, the said sum of £70 per acre, to be paid for by the said Joseph, Matthew, and James Jaggar, their executors, &c., to the said J. Sykes, his heirs, &c., yearly and every year, in such proportion as the sale and consumption of the said coals should or might happen to amount to, according to admeasurement being taken thereof by the said several parties, their respective executors, &c.

The plea then set forth a covenant by J. Sykes for quiet enjoyment by Joseph, Matthew, and James Jaggar of all the said coals, "being the said coals lying under the said closes in the said indenture mentioned, and whereof the said closes, &c. in the first count mentioned are parcel, premises, privileges, and appurtenances whatsoever, and also full and free liberty for the said Joseph, Matthew, and James Jaggar, their executors, &c., to fix all necessary gins or engines, and to build cabins in the said closes, and the same to remove and take away as occasion might re-

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quire; and also to make roads and ways for horses, carts, and carriages, in and over the closes aforesaid; as by the said indenture, &c. will more fully and at large appear; by virtue of which said hereinbefore partly recited indenture, afterwards and long before the time of committing of any of the said trespasses in the first count mentioned, to wit, on 1st January, 1805, the said Joseph, Matthew, and James Jaggar did commence sinking and digging certain pits or shafts, to wit, three pits or shafts, for the sale of coals in the said closes in the said hereinbefore partly recited indenture mentioned, and became entitled to the said powers, liberties, privileges, license, and authority aforesaid, for the said term so to them thereof granted as aforesaid, according to the terms, true intent, and meaning of the aforesaid hereinbefore partly recited indenture.

Averment, that afterwards, and after the making of the said indenture, to wit, on 1st January, 1805, the said Joseph, Matthew, and James Jaggar, after sinking the aforesaid pits or shafts in the said closes in the said indenture mentioned, for the sale of coals as aforesaid, and for the purpose of getting and vending of coals, did then, from the time of their sinking the said pits or shafts, proceed to get and win in a workmanlike manner the said coals under the said closes in the said indenture mentioned, until the said quantity of six acres of the said coals was won and gotten in a workmanlike manner. The plea then averred the deaths of Joseph and Matthew Jaggar, leaving James Jaggar then surviving, whereupon he "became entitled to the powers, liberties, privileges, license, and authority aforesaid, for the then residue and remainder of the said term for which the said powers, &c. were so granted as aforesaid to him and the said John and Matthew Jaggar, their executors, &c., according to the terms, true intent, and meaning of the aforesaid in part recited indenture, and which said term had not expired at the time of the commencement of this suit; and the said James Jaggar then

came and was entitled to carry on the said getting and ling coals until all the coals under the said closes, &c. in e first count mentioned should be gotten and disposed of." e plea then alleged, that James Jaggar made his will, pointing four executors, and on 28th April, 1843, died entitled to the said powers, liberties, privileges, &c., ing the same terms as just stated. It then stated the prov- g of James Jaggar's will by his executors, who there- pon, as such executors, became entitled to the said powers, c. (using the terms as just stated), "whereupon the de- ndants, as the bailiffs and servants of the said executors amed) of the said James Jaggar, deceased, as aforesaid, d by their command, divers, to wit, eighteen acres of coals ere then being and remaining unworked and ungotten, nder the said closes in the said partly recited indenture entioned, whereof the said closes, &c. in the first count entioned are part and parcel as aforesaid, at the said veral times when &c. in the first count mentioned, and ring the said term for which the aforesaid powers, erties &c., by the said hereinbefore partly recited in- nture, were granted to the said Joseph, Matthew, and mes Jaggar, their executors, &c., and which had not pired at the time of the commencement of this suit, and pursuance and exercise of the powers, &c., granted as oresaid by the said partly recited indenture, broke and tered the said coal mine, &c. in the first count men- ned, being part and parcel of the said coal mines, veins, d seams of coal lying under the said closes in the said in- nture mentioned, whereof the said closes, &c. in the first unt of the declaration mentioned are part and parcel, d there dug out of the said coal mine or vein of coals e said quantities of coal in the said first count men- oned, and took and carried away the same, and converted d disposed thereof to their the defendants' own use, as was lawful for them to do for the cause aforesaid, which the several alleged trespasses," &c. Verification.

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To this plea the plaintiffs, after craving oyer of the indenture, demurred specially, assigning for causes, inter alia, that no title to the locus in quo appeared to be vested in the executors of James Jaggar under the deed in question, and that such deed was not pleaded according to its true legal effect. By the deed, as set out on oyer at the head of the demurrer, it appeared that by indenture, dated 27th September, 1804, between John Sykes of the one part, and Joseph, Matthew, and James Jaggar of the other part, it was witnessed, that for and in consideration of the yearly rent thereinafter referred, and the covenants and agreements therein mentioned and contained on the part of the said Joseph, Matthew, and James Jaggar, their executors, administrators, and assigns, to be paid and performed, he the said J. Sykes granted, bargained, sold, and confirmed, unto the said Joseph, Matthew, and James Jaggar, their executors, administrators, and assigns, *all the coal mines, veins, and seams of coal* of him the said J. Sykes, lying and being within or under his closes of land, belonging to the farm and tenements at Flockton Moor Head, then in the possession of the said J. Sykes, commonly called or known by the several names of &c. (stating names of closes), together with all necessary roads and ways for horses, carts, and carriages, in and over the said closes or any of them, to and from the pits or shafts to be sunk in the said closes, for the convenience of taking and carrying away the said coal, with *full and free liberty* to the said Joseph, Matthew, and James Jaggar, their executors, administrators, and assigns, at all times during the term thereby granted, *to dig for, sink for, and get the same coal in a fair and workmanlike manner*, in the said closes, or any of them, together with a sufficient ground room, or bank room, in the said closes, near the said pits, to lay all such coals as should from time to time be gotten, and *full and free liberty* to sell and dispose of such coals, and for the purchasers thereof to carry away the same with horses, carts, car-

iages, or otherwise, as they the said Joseph, Matthew, nd James Jaggar, their executors, &c., should think best, y and along the roads which might be most conveniently ade for that purpose, and full and free liberty for the essees, their executors, &c., for the getting, selling, and arrying away the said coals, and clearing the same of and rom all water, gravel, damp, or other inconveniences, which ight obstruct or hinder the winning or working of the said olliery, they the said Joseph, Matthew, and James Jaggar, heir executors, administrators, and assigns, from time to ime doing as little damage as might be to the owner or ccupiers of the said lands and premises; and that by the ame indenture it was further witnessed, that for and in onsideration of the sum of £420 by the said Joseph, Matthew, and James Jaggar, some or one of them, paid to the said J. Sykes in manner following, that is to say, the sum of £35 on or before 2nd February, 1805, and the further sum of £35 on or before the 2nd February thence next following, and so successively every 2nd day of February in every year, until the full end and term of twelve years, commencing from the 2nd day in February next ensuing the day of the date thereof, although the said Joseph, Matthew, and James Jaggar had thereby covenanted to pay to the said J. Sykes, his heirs or assigns, the sum of £420, by yearly portions, as aforesaid, yet they the said Joseph, Matthew, and James Jaggar, their executors, &c., or any of them, should have *liberty or privilege of sinking a pit or pits* on the said closes, or any part thereof, for the use and benefit of getting and selling of coals at any time or times thereafter during the terms thereinbefore granted, for getting and vending of coals as aforesaid, at their will and pleasure, and to suit the convenience of them the said Joseph, Matthew, and James Jaggar, their executors, &c.; and for settling and barring all future and other payments more than the said sum of £420, for six acres of coals, after the said rate of £20 per acre, to be paid by portions as

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aforesaid, the said J. Sykes did, for himself, his heirs, executors, administrators, and assigns, thereby grant, agree, and covenant to and with the said Joseph, Matthew, and James Jaggar, their executors, administrators, and assigns, that for and notwithstanding anything thereinbefore or after contained to the contrary, they the said Joseph, Matthew and James Jaggar, their executors, &c., from and after the commencing of digging or sinking any pit or shaft for sale of coals in the said closes, should have and enjoy the *liberty and privilege* of getting, selling, winning, and working the said coals or mines in as large, ample, and beneficial manner to all intents and purposes whatsoever as the said John Sykes could settle and assure the same, *for any time or term* of years, computing the same from such time as the said Joseph, Matthew, and James Jaggar, their executors, &c., should so begin to sink as aforesaid, until the quantity of six acres of coals should be gotten, and at the expiration of the *term of twelve years*, then to be fairly measured at the joint expense of the said parties, and upon such admeasurement being taken, the full quantity of six acres of coals being not then gotten, to have *liberty to get* the remainder as aforesaid; and when all the coals were gotten in a workmanlike manner, to the quantity of six acres, then the said *business of getting and selling coals to be carried on as aforesaid, until such time as all the coals in the said closes be gotten and disposed of* by the said Joseph, Matthew, and James Jaggar, their executors, &c., paying or causing to be paid to the said J. Sykes, his heirs, and assigns, for every acre of coals to be gotten over and above the aforesaid quantity of six acres, the said sum of £70 per acre, to be paid for by the said Joseph, Matthew, and James Jaggar, their executors, &c., to the said J. Sykes, his heirs or assigns, yearly and every year, in such proportions as the sale and consumption of the said coals should or might happen to amount to, according to admeasurement being taken thereof by the said several parties, their respective

executors, &c.; and that the said Joseph, Matthew, and James Jaggar, their executors, &c., should have full and free *liberty and privilege* of getting stones in some convenient part of the said closes at any time or times of getting and vending of the said coals, for the use of making and repairing roads, for the use and benefit of carrying away the said coals when gotten, making such satisfaction for the same to the said J. Sykes, his heirs, or assigns, as they were then sold for per yard: to have and to hold all and singular the before-mentioned to be thereby granted coals, premises, and privileges, unto the said Joseph, Matthew, and James Jaggar, their executors, &c., from the 2nd day of February then next ensuing, for and during the term of twelve years thence next ensuing, and fully to be complete and ended: yielding and paying therefore to the said J. Sykes, his heirs, &c., the said yearly rent of £35, at the times and in manner thereinbefore specified; provided always and upon condition, that if the said yearly rent, or any part thereof, should at any time or times be in arrear and unpaid by the space of thirty days next after any day or time whereat or whereon the same ought to be paid as aforesaid, although not demanded, then and from thenceforth those presents should be absolutely void in case the said J. Sykes, his heirs, or assigns, should at any time afterwards choose the same to be void, but not otherwise; and the said J. Sykes did for himself, his heirs, &c., thereby grant, agree, and covenant to and with the said Joseph, Matthew, and James Jaggar, their executors, &c., that, under payment of the rents and performance of the covenants, conditions, provisoes, and agreements in these presents specified, or mentioned to be by the said Joseph, Matthew, and James Jaggar, their executors, &c., paid and performed respectively, they the said Joseph, Matthew, and James Jaggar, their executors, &c., should and lawfully might, peaceably and quietly, without any eviction, ejectment, suit, let, or disturbance, of, from, or by the said J. Sykes, his heirs, &c., have, hold, occupy,

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and enjoy all the said coals, premises, privileges, and appurtenances whatsoever, and also full and free liberty for the said lessees, their executors, &c., to fix all necessary gins or engines, and build cabins in the said closes, and the same to remove and take away as occasion might require; and also to make roads and ways for horses, carts, and carriages, in and over the said closes aforesaid; and the said Joseph, Matthew, and James Jaggar did, and every of them did, jointly and severally for himself and themselves, their respective executors, &c., thereby grant, agree, and covenant to and with the said J. Sykes, his heirs and assigns, that they the said Joseph, Matthew, and J. Jaggar, their executors, &c., should and would in every year, during the said term of twelve years, well and truly pay or cause to be paid unto the said J. Sykes, his heirs, &c., the clear yearly rent above thereby reserved, and every part thereof, at the times and in the manner thereinbefore appointed for payment of the same respectively, and should and would pay, bear, and discharge all taxes, lays, assessments, and impositions whatsoever, which should or might be taxed, layed, assessed, or imposed upon, or become due or payable out of, for, or in respect of the said intended colliery, whether parliamentary or otherwise, and should, whenever any of the said intended pits or shafts ceased to be used other than one pit or shaft, which it was agreed should be from time to time left open for air or vent during the said term, at their respective costs and charges, sufficiently fence about all such pits as should be kept open for air or any other necessary use, to prevent men and cattle from falling in therein; and also should and would, at the end or other sooner determination of the term thereby granted, make the ground to be used as and for roads for carrying off the said coals, only levelling the same; and should and would, at the expiration of getting of coals aforesaid, yield up and leave or cause to be yielded up and left, the possession of the said granted premises, and every part thereof,

peaceably and quietly, in such repair as aforesaid, unto the said J. Sykes, his heirs or assigns; and that the said J. Sykes, his heirs or assigns, or any of them, or any other person or persons whatsoever, by his, their, or any of their order, should or might, at any time or times thereafter during the said term, come and go into, upon, and from the said hereby granted coal mines and premises, or any part thereof, to view the same, without suit or disturbance; and that the said J. Sykes, his heirs, &c., should not nor would at any time or times during the term of getting the said coals in the said closes, suffer or cause to be suffered or made, any road or roads, drain, or drains, in the said closes of land, for the use and benefit of any other person or persons other than the said Joseph, Matthew, and James Jaggar, their executors, &c. In witness whereof, &c. (Executed by all the parties.)

The fourth plea (also to the first count) stated, that J. Sykes, being seised in fee &c., for a pecuniary consideration demised the mines to the former grantees for one year, under which demise those persons entered and became possessed &c. It then set out (with a profert) the indenture of the 27th of September, 1804, and on which the former plea was founded; but in this plea the deed was described as a *grant* and *release* of the mines to the grantees, their executors, &c., to hold to them, &c., till six acres of coal should be gotten, and after that all the coal should be gotten and disposed of. In other respects the fourth plea resembled the third.

The plaintiffs' replication, after craving oyer and setting out the indenture as before, traversed both the alleged demise for a year, and the alleged grant and release, concluding to the country.

The defendants demurred to this replication for duplicity, &c., and the plaintiffs joined in demurrer. The grounds of demurrer to this replication need not be stated further, as they were not discussed in the argument, the plaintiffs

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contending that the fourth plea was bad as on general demurrer, and the judgment of the Court proceeding upon the question of the sufficiency of the pleas only.

The case was argued in last Michaelmas Term, by

Atherton, in support of the demurrer to the third plea.—As to the *third* plea. The defendants justify under the executors of James Jaggar, the survivor of the three lessees in the deed set out on *oyer*. In doing so, the defendants set out, as the legal effect of that deed, a right (after six acres of coal should be gotten) in the lessees and their *personal representatives*, to get coal under certain closes, *till all the coal should be gotten*. The main objection is, that such is not the legal effect of the deed. The entire deed, with the exception of one solitary passage beginning with the words—"And when all the coals are gotten in a workmanlike manner to the quantity of six acres, then the said business of getting and selling coals," &c.—is framed as a "lease" of the coal under the closes for twelve years, with "liberty" of getting coal at any time, even after the twelve years, until six acres shall have been gotten. The effect of the passage particularized is that, after the getting of the six acres of coal, the business of getting and selling coal should be carried on until all the coal under the closes should be obtained and disposed of—the lessees and their executors, &c. paying a proportional yearly rent. The habendum, which follows this part of the deed, and the office of which is to "limit the certainty of the estate," (1 Inst. 6 a.), clearly defines a term of twelve years as the limit of the interest conveyed; and it is, therefore, not clear that any *estate* subsisted after the expiration of that period, or more than a *contract* for an interest. But, even if the intention is clear, no estate could pass to endure after the death of the surviving lessee: and, thus, for want of words of inheritance—whether there was a grant of the mines themselves, as would seem to have been the case for the

years, or a grant of a liberty to dig for coal only, ɾond the twelve years no more than this could have z))—in each case, and equally, words of inheritance cessary. The only difference between the two in- vould be, that one would be a corporeal, the other poreal, hereditament: but either would be a "tene- according to Lord *Coke's* well-known definition in Inst. 6 a. To the same effect is 1 Inst. 19 b, 20 a. till all the coals should be gotten, is for a period ily of uncertain duration; which makes the interest ld. But a freehold interest in "lands or tenements," bsence (in a deed) of words of inheritance, is but an ɪr life, whatever other terms indicating perpetuity used. Littleton, s. 1 (*b*). At the furthest, there- ɪ interest created by this deed ceased on the death urviving grantee: whereas the plea sets up its con- ɪ in the devisees under his will.

ɪ the *fourth* plea. Putting aside the replication, this ɪd on general demurrer; for it equally fails to set true legal effect of the deed—each plea being ɔn the same instrument,—as, at the utmost, a grant ives of the grantees. It also describes the deed as ɪse," which the language of the deed itself, as set yer, distinctly negatives.

ng, contrà.—This deed is certainly a very inartificial ɜnt. If the argument for the plaintiffs is correct, is to a great extent inoperative; for there could not ɜhold legally conveyed, commencing at the end of ve years, nor on 2nd February, 1805, there having inrolment of the deed; so that the deed would be

ɪ this point, the follow- were mentioned in ar- namely:—*Lord Mount-* Godb. 18; *Cheetham* v. *m and Others*, 4 East, 469; *Doe* d. *Hanley* v. *Wood*, 2 B. & Ad. 724; *Jones* v. *Reynolds*, 4 A. & E. 805.

(*b*) See also 2 Bla. Com. c. 7.

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reduced to a lease for twelve years. Looking at it with a view to further the intent of the parties, it having been acted upon for so long a period, it may be supported thus: it amounts to a lease for twelve years certain, and as much longer as requisite to win the whole of the mines then working in a workmanlike manner; and as it is a deed, and made for a sufficient pecuniary consideration, it operated under the Statute of Uses as a bargain and sale of a chattel interest, and inrolment was unnecessary. That it was intended that all the coals should be got under it, appears from several expressions in it, as, "the said business of getting and selling coals to be carried on as aforesaid, until such time as all the coals in the said closes be gotten and disposed of," &c. Such an interest as is contended for might be created by will, and would be considered as a chattel interest; thus, a devise to A., his executors, &c. in trust to pay the debts of B., has been held a chattel interest: *Doe* d. *White* v. *Simpson* (*a*). See note 7, by Hargrave and Butler, to Co. Litt. 42. a. But "feoffment to the use of A. for life, remainder to the use of B., his executors and assigns, till £10 shall be levied out of the profits," was ruled to be a chattel. So, in *Rosse's case* (*b*), it appears taken for granted that a man levying a fine to the use of himself for life, remainder to his executors, until they shall have levied £300 for performance of his will, creates an interest lasting until that sum has been duly raised. These authorities shew that such an interest as is contended for may be raised by way of use. Now, no technical words are necessary to carry out the intention; it is enough if the Court can see that the lessor intends to convey to, that is, to bargain and sell to the use of, the lessees, their executors,

(*a*) 5 East, 162. As to this case, see the clauses in the new Will Act, 1 Vict. c. 26, s. 30, 31, 32; also 2 Man. & Gr. 937.

(*b*) Moor, 556. *Thomasin* v. *Mackworth*, Carter, 76, 77, was cited by *Alderson*, B., as contrary.

&c. There is sufficient pecuniary consideration to support the deed as a bargain and sale, the reservation of rent being enough for the purpose: 2 Sanders on Uses, 47, 49, 4th ed. The cases where uncertain interests have been held not to be chattel interests are distinguishable. If lands be given to a man so long as a tree stands, a freehold interest is conveyed, because a man may have a freehold interest in the tree itself. So, where lands are given until A. makes J. S. bailiff of his manor, as in Co. Litt. 42. a, note (6), Hargrave and Butler's edit.; because A. has all his life in which to appoint. But there seems no more reason for holding the interest in the present case to be freehold, than would apply for holding a conveyance till certain debts are paid to be a freehold. If the mines are duly worked they must be won within a limited period. [*Alderson*, B.—Has it not been held that though such a construction may be put on wills, it will not on deeds?] *Cordell's case* (*a*) is the only authority to that effect; but the first resolution there appears pointed at deeds operating at common law, and not by way of use, and there seems no reason why there should in this respect be any difference between deeds operating by way of lease and wills. [*Rolfe*, B.—That explanation of the resolution in *Cordell's case* certainly receives some confirmation from what is said of that case in *Manning's case* (*b*).]

Atherton, in reply.—The right to obtain all the unsevered coal is a real and not a chattel interest in its nature; and the defendants are not in a position to contend for the operation of the deed as a bargain and sale under the Statute of Uses, inasmuch as they have not pleaded an election that it should so operate, which was necessary, according to *Green* v. *Miller* (*c*).

Cur. adv. vult.

(*a*) Cro. Eliz. 316. (*b*) 8 Rep. 96 a. (*c*) 8 Bing. 92.

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On this day the judgment of the Court was delivered by

PARKE, B.—(After stating the pleadings, the learned Baron proceeded). The questions in this case arise upon the special demurrer to the third, and the demurrer to the replication to the fourth, plea.

The replication being bad for duplicity, the plaintiff contends that the fourth plea is bad on general demurrer.

The substantial question on both is as to the legal effect of the deed set out on oyer, and relied upon as a defence in both pleas.

This deed is most inartificially drawn. It appears to us, however, to operate as a lease of the mines to the Jaggars, and their executors, for twelve years from the 2nd February, 1805, at all events. Whether the deed, as to the subsequent right to get coals is more than a covenant to grant for a subsequent term, is a question; but we think it operates as a grant of an easement, after the expiration of that lease, to win the remainder of the six acres paid for by the sum of £420; and whenever that quantity should be got, to win the remainder, paying £70 an acre. The lease for twelve years is good at common law; the limitation for the indefinite term afterwards, of the incorporeal hereditament only, which is to continue for an uncertain period, viz. till all the coals are got, would in a common law conveyance be either an estate for life, in which case it terminated on the death of the survivor of the grantees; or an estate for term of years, and if so, it would be void for want of the certainty of years. As a common law conveyance, therefore, it would afford no defence. But according to the authorities cited by Mr. *Cowling*, viz. Co. Litt. 42; Hale's MSS., *Rosse's case* (*a*), these words would convey that interest only in a conveyance to uses or a will, and would, therefore, devolve on the executor of the surviving lessee;

(*a*) Moor, 556.

and so there would be a defence to this action. But the defendant's pleadings are open to the objection, that there is no averment that the lessees elected to take the interest by way of use; and this is necessary, on the authority of Sir *Rowland Hayward's case* (*a*), and *Green* v. *Miller* (*b*), otherwise it must be taken to operate at common law. It appears indeed on the pleas, that the lessees entered and got the coals, and this would be an entry under the lease for twelve years, and if so, it would probably be a conclusive election that the whole deed should operate at common law. Sheppard's Touchstone, 83.

We think, therefore, that the pleas are bad. Mr. *Cowling* should amend on the usual terms, and plead the deed as operating by the Statute of Uses, and state its legal effect, which is done in neither of the present pleas; and on that account the third at least is bad, the objection being pointed out on special demurrer.

Judgment accordingly.

(*a*) 2 Rep. 526. (*b*) 8 Bing. 92.

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Feb. 10.

Defendant, on becoming tenant to plaintiff of a farm and out-buildings, agreed to *keep* the same, and at the expiration of the tenancy to deliver up the same, *in good repair*, order, and condition. Breach, that he did not keep and deliver up the farm, &c., in good repair, &c.: —*Held*, that, on this contract to *keep* the premises in good repair, the tenant was bound to *put* them in that condition, and that the tenant was not justified in keeping them in bad repair because he found them in that condition; but the extent of that repair was to be measured by their age and class.

ASSUMPSIT. The declaration stated, that the defendant, on &c., became tenant to the plaintiff of a certain farm, out-buildings, &c., on the terms, amongst others, that he should pay all rates and taxes in respect of the said farm, &c., and should "keep the same, and at the expiration of the said tenancy should deliver up the same, in good repair, order, and condition." Breach, that the de-

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fendant did not pay the taxes, and did not keep the farm, out-buildings &c., and at the expiration of the tenancy deliver up the same, in good and sufficient repair, order, and condition. Pleas, as to the sum of 6*l.* 6*s.* 1*d.*, payment of that sum on account of the income-tax; 2nd, as to the residue, payment of 115*l.* into court, and no damages ultra. Replication, similiter to first, and to second plea, damages ultra. At the trial, at the last Somersetshire assizes, before *Platt*, B., the plaintiff proved bad repair of the thatch on the out-buildings, as also the gates. The defendant sought to prove that the gates had fallen to pieces from age alone, and that the thatch was better when he left than when he entered. The learned Baron told the jury to consider the state of the premises when the defendant entered, adding, that it was enough if the defendant left them in as good plight as he found them, and that he was not bound, on quitting the farm, to replace the matters demised by leaving new instead of old, or oak instead of apple-tree posts. Verdict fo rdefendant. A rule having been granted for a new trial, on the ground of misdirection,

Crowder and *F. Edwards* shewed cause.—The ruling of the learned judge was correct, and a tenant who contracts to *keep* premises in good repair fulfils his undertaking by leaving them substantially in the same condition in which he received them. This is not only the popular view of this contract, but is the common-sense construction of the words, and is borne out by the authorities. It is quite clear that the words "good repair" cannot mean any absolute and ascertained state of repair; because if they did, a party taking a house of the plainest description, if he contracted to keep it in good repair, would be obliged to leave it in the same state and condition as the tenant of the most highly-finished house, who had entered into the same contract. The description "good repair," therefore, must be a

elative description; and the only question to be decided is, whether that has relation to the state of the premises when demised. [*Parke*, B.—It has been decided in several cases, that, so far as the defendant is concerned, that expression has relation only to the age of the building. Good repair is different in old and new premises; but here the defendant is to "keep in good repair;" that would apply to premises in bad condition when demised to him.] It would seem hardly possible in principle that this should be the case, since it can make no difference to the tenant whether the house is out of repair by reason of its age or the previous neglect of the landlord. It is therefore submitted, that if a tenant is protected, on an alleged breach of his contract to repair, by shewing the state of the premises at the time of the demise in the one case, he ought to be in the other also. There will be no difficulty if it is held that the term "good repair" has reference to the state of the premises at the time of the contract. And this construction is evidently the proper one, as the tenant does not undertake to "put" the premises into good repair, but to "keep" them so. Johnson gives the meaning of the word "keep" as "to preserve in the same state and tenor." It is therefore as if the parties had agreed together that the premises in their then state were in good repair, and that the tenant should preserve and keep them in the same state. Nor are the authorities contrary. *Stanley* v. *Towgood* (*a*) shews that the state of the premises at the time of the contract ought to be considered by the jury. *Burlett* v. *Withers* (*b*) is a still stronger authority in favour of the ruling of the learned judge in this case, as the Court of Queen's Bench there granted a new trial because the judge had told the jury not to consider the state of the premises at the time the defendant took them. *Harris*

(*a*) 3 Bing., N. C., 4. See *Mantz* v. *Goring*, 4 Bing., N. C., 451.
(*b*) 7 Adol. & Ell. 136.

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v. *Jones* (*a*) and *Gutteridge* v. *Munyard* (*b*) are to the same effect. In the latter case, *Tindal*, C. J., in summing up to the jury, said:—" Where a very old building is demised, and the lessee enters into a covenant to repair (*c*), it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as results from time and nature, falls on the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time on the premises, it would not perhaps be fair to judge him very rigorously by the reports of a surveyor, who is sent on the premises for the very purpose of finding fault. Still there is only a certain latitude to be allowed in these cases, and the jury are to say whether or not the lessees have, in the present instance, done what was reasonably to be expected from them, looking to the age of the premises on the one hand, and to the words of the contract which they have chosen to enter into on the other"(*d*). [*Alderson*, B.—The criterion of *Tindal*, C. J., as to results from time and nature, is difficult for a jury. Suppose a house built forty years to have old windows, what is the rule as to repairing them? Or suppose a new house demised for ninety-nine years, if the test be the state in which it was when the first tenant

(*a*) 1 Moo. & R. 173, per *Tindal*, C. J.

(*b*) Id. 334, 336.

(*c*) The defendant in that case had also agreed to *keep* in repair with all needful reparations.

(*d*) See this summing up cited in *Mantz* v. *Goring*, 4 Bing. N. C., 451.

ntered, it would be unfair to be compelled to keep it in he same state ever after.]

PARKE, B.—If, at the time of the demise, the premises were old and in bad repair, the lessee was bound to put them in good repair as old premises; for he cannot "keep" them in good repair without putting them into it. He might have contracted to keep them in the state in which they were at the time of the demise. This is a contract to keep the premises in good repair, as old premises; but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all shew that the age and class of the premises let, with their general condition as to repair (*a*), may be estimated, in order to measure the extent of the repairs to be done. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor-square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term.

ALDERSON, B.—The marginal note of *Burdett* v. *Withers* (*b*) may be incorrect, but the judgment is quite right, and shows that a lessee who has contracted to keep demised premises in good repair, is entitled to prove what their general state of repair was at the time of the demise, so as to measure the amount of damages for want of repairs by reference to that state. *Stanley* v. *Towgood* (*c*) had seemed

(*a*) 6 Scott, 227. See *Muntz* v. *Goring*; *Belcher* v. *M'Intosh*, 3 C. & P. 720; 2 M. & Rob. 6.

(*b*) 7 Ad. & E. 136, T. 1837; *Muntz* v. *Goring*, E. 1838, 4 Bing., N. C., 451, S. P.

(*c*) 3 Bing., N. C., 4, T. 1836.

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to shew that, though the age of a house at the time of its demise must be considered in estimating the amount of repair on which the lessor can insist, yet any inquiry into its state of repair at the time of entry would be misplaced. However, as *some* want of repair then existed, and the case was left to the jury as to the amount of damages, which they found under 20*l*, the Court would not interfere. It is no doubt, in practice, difficult to say what is a putting premises, so old as to be ready to perish, into good repair, or keeping them in it; but a contract to "put" premises in good repair cannot mean to furnish new ones where those demised were old, but to put and keep them in good tenantable repair, with reference to the purpose for which they are to be used.

ROLFE, B.—By the contract put in evidence, the wood on the farm is not to be used except for new gates. That seems to have contemplated repairing or replacing them. The term "good repair" is to be construed with reference to the subject-matter, and must differ, as that may be a palace or a cottage; but to "keep in good repair" presupposes the putting into it, and means that during the whole term the premises shall be in good repair.

PLATT, B., concurred.

Rule absolute.

Cockburn and *Prideaux* were to have supported the rule.

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OWEN *v.* DE BEAUVOIR (*a*).

LEVIN for a cart distrained in a certain barn, in the of West Ilsley, in Berkshire. Avowry, that the ant well avows the taking of the said cart, goods, attels in the said declaration mentioned, in the said n which &c., and justly &c., because he saith that said time when &c., the said barn in which &c., ırcel of a certain tenement called Hodcott Farm, ·ise Hodcott, with the appurtenances, situate and in the county of Berks, and holden of the manor of eld Mortimer, within the said county, by fealty, e rent of nine shillings yearly, to be paid at the feast- ' St. Michael in every year (*b*), according to the old ınd computation of time formerly used in this king- ·), of which said manor the defendant before and time when &c. was the owner, and thereof lawfully sed; and because the plaintiff held and occupied the ·arn, with the appurtenances, in which &c., at the

Replevin for distraining a cart on 13th May, 1845. Avowry, (under 11 G. 2, c. 19, s. 22), that the locus in quo was parcel of a tenement called H., holden of the manor of S. M., by fealty and rent of 9s. yearly, to be paid at Old Michaelmas in every year, of which manor defendant, at the time when &c. was the owner, and that, because defendant occupied the locus in quo at the time when &c., and because 2*l.* 14*s.* of the rent

l for six years, ending at Old Michaelmas, 1844, was in arrear, defendant well avows ng the said cart, &c. Pleas in bar:—first, that the locus in quo was not parcel of the ıf S. M.; second, that it was not holden of that manor; third, that defendant was not nd possessed of that manor; fourth, that no rent was in arrear. Issues thereon. H. s holden of the manor of S. M., at an ancient freehold rent of 9*s.* per annum, payable aelmas, yearly. All arrears to Michaelmas, 1824, were paid in January, 1825. No ıyment took place, but, after repeated applications for the rent in several years before lmas, 1844, the lord distrained in May, 1845, for six years' rent due at Michaelmas, -*Held*, first, that, by the operation of 2 & 3 W. 4, c. 27, sections 2, 3, and 34, the rent :inguished by the lapse of twenty years from the day on which the last payment was and, second, that the bar thus interposed by that statute of limitations need not be y pleaded, and might be given in evidence on the plea in bar of non tenuit.

plevin, the judge's opinion at the trial was in favour of the defendant, so that he had no ı to tender a bill of exceptions; but leave was given to move to enter a verdict for the f. The Court afterwards entered a verdict for the plaintiff. The effect was to extinguish t, the subject-matter of the avowry, without leaving any means of reviewing the judg- The Court inclined to grant a new trial, but recommended a special verdict, in order r the case at once into a court of error, which was afterwards consented to, on terms.

Decided in Easter Term, 20).

5 B. & Ald. 392; Litt., 213, 131, and 225.

(*c*) See *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 1 Moore & Scott, 380; 8 Bing., 235.

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time when &c. (*a*), and because the sum of 2*l.* 14*s.* of the rent aforesaid for six years next before and ending at the feast-day of St. Michael, which was in the year of our Lord 1844, according to the said old style, at the said time when &c. was then due, in arrear, and unpaid, to the defendant, he the defendant well avows the taking of the said mentioned cart, goods, and chattels, in the said barn in which &c., so being parcel of the aforesaid tenement called Hodcott Farm, otherwise Hodcott, with the appurtenances, and holden of the said manor of Stratfield Mortimer, as aforesaid, and justly &c., as a distress for the aforesaid rent so then being due, in arrear, and unpaid to the defendant, according to the form of the statute (*b*) in such case made and provided. Verification, and prayer of judgment, and a return of the said cart, goods, and chattels, together with defendant's damages, costs, and charges in this behalf, according to the form of the statute (*c*) in such case made and provided, to be adjudged to him &c.

Pleas in bar:—First, that by reason of anything in the said avowry alleged, the defendant ought not to avow the taking of the said cart, goods, and chattels in the said declaration mentioned, in the said barn in which &c., and justly &c., because the plaintiff says, that the said barn in which &c. was not parcel of the said tenement called Hodcott Farm, otherwise Hodcott, in manner and form as in the said avowry alleged; concluding to the country. Second, that the said barn in which &c. was not holden of the said manor, in manner and form as in the said avowry alleged; concluding to the country (*d*). Third, that the defendant was not the owner and possessed of the said

(*a*) See Moor's Rep. 883; 3 Vin. Abr., 407; Hobart, 108.

(*b*) 11 G. 2, c. 19, s. 22; see *Bulpit* v. *Clarke*, 1 New Rep. 56; *Banks* v. *Angel*, 7 Ad. & E. 843. See also 12 Ad. & E. 341.

(*c*) See 7 H. 8, c. 4, s. 3; 21 H. 8, c. 19, s. 3; 4 Geo. 2, c. 28.

(*d*) See per *Rooke*, J., in *De Costa* v. *Clarke*, 2 Bos. & Pull. 376.

manor, in manner and form as in the said avowry alleged; concluding to the country. Fourth, that no part of the said rent was due or in arrear, in manner and form as in the said avowry alleged; concluding to the country. Issues thereon.

At the trial, at the last Berkshire assizes, before *Maule*, J., it was proved for the defendant, that for the period between Michaelmas, 1784, and Michaelmas, 1824, the yearly rent in question had been paid for Hodcott Farm by its owners, or their tenants in possession, to the defendant and his ancestors, lords of the manor of Stratfield Mortimer, as held in free tenure of that manor (*a*). On 15th January, 1825, eight years' arrears, due at Michaelmas, 1824, were paid by the then occupier, by direction of his landlord, to the defendant's agent. Repeated applications on behalf of the defendant were afterwards made for payment of subsequent arrears, but without success; and on the 15th May, 1845, the defendant distrained on the plaintiff's cart, while standing in a barn, shewn to be parcel of Hodcott Farm, for six years' (*b*) arrears, due at Michaelmas, 1844. The defendant tendered evidence to prove the existence of the manor, and its having been in his possession and that of his ancestors for more than sixty years, when the plaintiff's counsel interposed, contending that the "right and title" of the defendant to the rent was extinguished by lapse of time, under the operation of 3 & 4 Will. 4, c. 27, ss. 2, 3, and 34, which transferred the estate in the rent to the plaintiff. For the defendant it was answered, first, that the twenty years mentioned in sections 2 and 3 began to run, not from the time the last payment of rent was made, but from Michaelmas, 1825, till which time no rent was due, so that the right to distrain or sue for any

(*a*) See *Doe* d. *Whittuck* v. *Johnson*, Gow's Rep. 173; cor. *Holroyd*, J.

(*b*) See *Paget* v. *Foley*, 2 Bing. N. C. 679, as re-stated per Cur., 3 Bing. N. C. 549.

James v. *Lewis* (a). Maule, J., expressed his
favour of the defendant on the first point, and w
to think that, if the statute did in fact operate
should have been pleaded. He also noticed, that
not provide anything as to *arrears* of the rent e
by it. And he directed a verdict for the defe
leave to move to enter a verdict for the plaintif
(the costs of the replevin bond). Verdict for the
for 2*l.* 14*s.*, the amount of the six years' arrea
being found to be of the same value.

In Michaelmas term last, *Whateley* moved acco
leave reserved.—Sections 2 and 3 shew that the
tion is, when the last payment was made. Th
is raised by the last plea in bar, viz. of riens
[*Parke*, B.—No; that plea admits the rent to b
but says it has been satisfied by payment or
whereas the effect of sect. 34 is to extinguish t
the rent altogether; so that, at the time of the
tenement would not be held subject to such rent
B.—The plea admits there is a rent, but says
arrear; whereas the plaintiff's point is, that ther
rent, not that he did not hold. *Rolfe*, B.—The
that the plaintiff holds at a rent of 9*s.*, payable
mas.] The plaintiff contends that no rent is in arr
it has been extinguished by the operation of the
B.—According to that argument, non tenuit woul

atisfied by payment, by accord and satisfaction, or other-
, consistent with its admission that the rent is payable
espect of the tenement mentioned in the avowry.] At
vents, the second plea in bar amounts to non tenuit.
erson, B.—Suppose the rent was payable once in twenty
s?]

rule having been granted, at the present sittings,
. 10),

yrwhitt shewed cause for the avowant.—It is clear
this was a "rent" within sect. 2 of 3 & 4 Will. 4,
, being an ancient rent-service charged on the land,
which an assise would lie: *Paget* v. *Foley*(*a*), *Grant*
llis (*b*). There are, then, two points: first, whether
stat. 3 & 4 Will. 4, c. 27, operated as a bar to the
ndant's distress; secondly, if it did, whether it should
been pleaded specially. On the first point; the statute
ot operate as a bar. It will be contended that, as the
ayment of rent took place on 15th January, 1825, when
rrear due at Michaelmas, 1824, was paid off, the dis-
made on 13th May, 1845, for six years' rent due at
aelmas, 1844, was made more than twenty years after
ight to make a distress accrued, viz. after the "last
" at which the rent was "received," those being the
s of sect. 3. It will thus be sought, not to read sect. 3
cillary to sect. 2, in cases not absolutely provided for
t, but to make sect. 3 override the second section.
at is so, the defendant's "right to make a distress" for
reehold rent must have accrued at some time before
ent due at Michaelmas, 1825, had become due, though
first right to distrain could have only then arisen.
t argument would enure to the disinherison of the
er of the rent, and to a parliamentary conveyance
t to the tenant, under sect. 34. But, unless such an

(*a*) 2 Bing. N. C. 679. (*b*) 9 M. & W. 113.

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absurdity in terms is inevitable from the wording of the act, those consequences will not be permitted to follow. The real question is, when did the right to make a distress for any arrear of rent "first accrue" to the avowant? The answer is, at Michaelmas, 1825, and not before; for this being an ancient rent service, payable at the end of each year (*a*), no rent whatever was due till that day. To make the distress of 13th May, 1845, out of time for more than twenty years after the right to make distress "first accrued," the plaintiff must say that that right "first accrued" before 13th May, 1825; but the rent then in course of accruing due, for the first of the twenty years, reckoned from Michaelmas, 1824, could not be distrained for till the Michaelmas of 1825. On sect. 2 (*b*) standing alone, this case is clear in favour of the avowant; the difficulty is set up on sect. 3 (*c*), which is read as con-

(*a*) See Latch. 264; Bac. Ab., Rents, (E.)

(*b*) By 3 & 4 W. 4, c. 27, s. 2, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years *next after the time at which* (see ss. 14, 16) *the right to make such entry or distress* or to bring such action shall have *first accrued* to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years *next after the time at which* (see ss. 14, 16) *the right to make such entry or distress*, or to bring such action, shall have *first accrued* to the person making or bringing the same.

(*c*) By sect. 3 it is enacted, that in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have *first accrued* at such time as hereinafter is mentioned; that is to say, when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall *while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.* [The rest of the section is inapplicable to this case.]

By s. 34 it is enacted, that at the determination of the period limited by this act [viz. by ss. 2,

trolling the plain enactment of sect. 2. On the relation of these two sections to each other, *Tindal*, C. J., makes the following observations, in delivering the judgment of the Court of Common Pleas in *James* v. *Salter* (*a*). "That this case must have been governed by the 2nd section, had that section stood alone, cannot be doubted; and on a more close examination of the 3rd section, the object and intent of it seem to us to be no more than this—to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued' in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the 2nd section, but is not included among the instances given by the 3rd, to be governed by the operation of the 2nd." He adds, "Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the 3rd section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly

2, ante, and s. 16, infra, p. 558, note,] to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit, respectively, might have been made or brought within such period, shall be extinguished.

(a) 3 Bing. N. C. 544, 553, 555. Distress in 1835, for £870, part of and arrears of the annuity of £30 (for above twenty-five years), beginning to accrue at testator's death, April, 1805. No distress was made for twenty-nine years after the right to distrain first accrued, and that *fact appeared on the record* (see per *Tindal*, C. J., p. 551); and there was a plea in bar, that it was not made within six years after the said arrears in respect of said annuity became due; but the defendant was held entitled to judgment, because the question only respected the amount of arrears, and not the *title* to the annuity, and the distress was in time for the last six years. (Per Cur., 3 Bing. N. C. 555).

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and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances, except those enumerated in the 3rd section." In a later part of the judgment the Chief Justice distinctly says, "the claim and title of the defendant to the annuity is barred by the lapse of twenty years since his right to distrain 'first accrued.'" In *Grant* v. *Ellis* (*a*), this Court says: "In the 3rd and some other sections, the act proceeds to define the time in *most*, though (as is noticed by *Tindal*, C. J., in *James* v. *Salter*), *not in all*, possible cases at which the right to make a distress for the purpose of recovering any rent shall be deemed to have 'first accrued' to the party making the same."

It is contended, that where the meaning of a section is clear, a court is not at liberty to create doubts by referring to other sections. Now sect. 2 contemplates the case where the right or title to the rent itself is disputed (*b*); but if sect. 3 has operation in this case, the defendant could not have "*discontinued*" receipt of this rent before his *right* to its possession accrued at Michaelmas, 1825, viz. before, in the words of sect. 3, he was "*entitled thereto*." [*Parke*, B.—Those words only apply to the estate in the rent.] The avowant did not "discontinue" its receipt till it fell first in arrear at that date. If the defendant "*discontinued*" its receipt at the last payment of it in January, 1825, then, though no one else has received it since adversely to him, the not distraining for it *before* it was due, viz. 13th May, 1825, will, under sect. 34, extinguish the avowant's estate in it, and transfer it to the tenant. To be "dispossessed" of a rent, some one must have successfully disputed your title, and the rent must have been *received by another* by paramount title, or withheld by hostile resolution of the rent-payer. The word "dispossession"

(*a*) 9 M. & W. 113 and 124.
(*b*) Per Cur., 3 Bing. N. C. 552; Sugd., Vend. & P., 11th edit., 617.

a sect. 3 may more properly apply to "land," but is the key to the meaning of "discontinuance" of receipt of rent; for it means hostile dispossession, and is quite different from mere omission to receive. To bring this case within sect. 3, the defendant must have voluntarily discontinued the receipt of the rent, or, as observed by *Alderson*, B., in *Doe* d. *Davy* v. *Oxenham* (*a*), "a party might lose his estate by having an insolvent tenant," or, as might be added, by indulgence, or reluctance to enforce a small right by distress, though constantly, as in this case, applied for during the twenty years. Another absurdity results from the argument on the other side. If sect. 3 overrides sect. 2 in this particular, so as to make the statute begin to run from Michaelmas, 1824, the rent was lost and barred at Michaelmas, 1844, viz. in nineteen years after the first payment of it which fell in arrear, viz. at Michaelmas, 1825, could be enforced by distress or action. But if the plaintiff only contends that the twenty years count from the "*last time*" the rent was in fact "received," then, if it was not paid till a year or ten years after due, it would follow that the twenty years would begin to run from the time, whatever it might be, of the rent being "received" in point of fact, which would make the operation of the rule depend in every case on an uncertain event, and the time of limitation, instead of depending on the day when the rent which was paid became due, might be indefinitely extended. Nothing is provided by sect. 34 as to extinguishing any arrear of a freehold rent(*b*). Then what is to become of the twentieth year's rent, where the last previous payment of rent was at a date more than twenty years before the end of the twentieth year, before which

(*a*) 7 M. & W. 131.

(*b*) Sect. 42 seems to provide for arrears of rent reserved by demise; see 9 M. & W. 118, arguendo.

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time the rent of that year was not due? For if the argument on the other side is to prevail, as no payment had been made within those twenty years, the twentieth year's rent would no sooner be due than it would be extinguished by sect. 34. But an adherence to the clear words of sect. 2 prevents that absurdity. Copses of underwood, grown for hop-poles, might well be held at an ancient freehold rent, payable in the year of cutting them, be that the tenth or twentieth year of their growth. Again, supposing nineteen years' rent not paid till five years after the lapse of the twentieth year from the previous payment—is the statute to run from the end of the five years, that being "the last time at which the rent was received" in fact? If it is, the time of limitation will be indefinitely extended, instead of remaining capable of being accurately fixed by the day on which the right to the rent and the remedy for recovering it first accrued.

Secondly, if the Statute of Limitations, 3 & 4 Will. 4, c. 27, constitutes a defence in this case, it should have been pleaded specially in bar, and cannot be taken advantage of on non tenuit. The course of pleading on the ancient statutes of limitation has always been to plead them in bar to avowries for freehold rents, whether they were known to commence by deed, or were ancient and did not. Thus, in *Couper* v. *Fisher* (*a*), the avowry was on 32 H. 8, c. 3, s. 4, for a rent founded on a deed, not alleging seisin thereof within time of limitation. The plea in bar was, that neither the intestate nor his ancestors, nor any other whose estate

(*a*) 1 Brownlow, 169; 6 Jac. 1; S. C. as *Foster's case*, 8 Rep. 64, (vouching *Warring's case*, in C. P.), cited 2 Saund. 63 *b*, n. See *Bennet* v. *King*, 3 Lev. 21; 8 Went. 137. In *Collins* v. *Goodall*, 2 Vern. 235, the Lords Commissioners of the Great Seal say that *Foster's case*, in 8 Rep., concerns only customary rents between lord and tenant, and not rents that commence by grant, or whereof the commencement can be shewn.

the avowant hath in the rent, were ever seised of the same rent within forty (*a*) years then last past before the taking; "and demurrer, pretending that avowry ought to allege seisin in the *avowant* within forty years;" but the avowry was held good. For as the rent was avowed for under a deed, the avowant was not bound to shew seisin within forty years, "but same shall come on the other part; *scil.* not seised of the services after (*b*) the limitation (*c*)." Again, as to ancient freehold rents not commencing by deed, (before 11 Geo. 2, c. 19, s. 22,) seisin of them was alleged in the avowry; and the rule of pleading was that "seisin ought to be confessed and avoided, as by coercion of distress, or traversed, (viz. by plaintiff), and traverse shall never be of seisin generally, *but ever of seisin within time of limitation* (*d*), *as the books are*, Dyer, 315, pl. 101 and 330 b; 8 Co. 64, *Foster's case.*" Dict. 'per *Harvey* and *Croke*, Js., in *Fawkeners* v. *Bellingham* (*e*). This shews that, anciently, non tenuit did not raise the defence of the Statute of Limitations.

This avowry, being by the owner of a manor for an ancient freehold rent belonging to it, does not, since 11 Geo. 2, c. 19, s. 22, set forth the avowant's title, as would have formerly been necessary. See *Bulpit* v.

(*a*) Fifty years is the term in Cay's print of stat. 32 H. 8, c. 2, s. 4.

(*b*) '*Puis*,' Dyer, 315, 330.

(*c*) And see *Harwood* v. *Paramour*, (12 Jac.), 1 Roll. R. 50, S. P.; also Moore's Rep. 31, pl. 101; *Freeman* v. *Starkie*, Hutton's Rep. 109.

(*d*) Viz. fifty years; Cay's Statutes, 32 H. 8, c. 2, s. 4.

(*e*) Cro. Car. 81, 82, 214. S. C. Hetley, 45; W. Jo. 238. Replevin. Cognizance for rent arrear of eighteen shillings and four arrows annually, at Michaelmas, paid for a meadow held as of a manor. Pleas in bar: 1. Non tenuit; 2. Possession of the rent by avowant within forty years. Demurrer by avowant (confessing no seisin being had within forty years), on the ground that such a rent was not within stat. 32 H. 8, c. 2, but a new rent, and a rent seck only; and so held by three justices, against *Harvey* and *Croke*, justices, but reversed in error, Cro. Car. 214, and judgment for the plaintiff.

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Clark (*a*). It must be said, that, though 3 & 4 Will. 4, c. 27, s. 34 (*b*), extinguishes the *right* as well as the *remedy*, so that after twenty years it transfers the estate in the rent to the occupier, as it were by parliamentary conveyance, that enactment may be relied on on non tenuit, whereas on the old Statutes of Limitation, which only took away the remedy, it was necessary to plead it in bar. But nothing in sect. 34 expressly makes any difference in the rule of pleading, and it is subject to sect. 16 (*c*), the clause of saving for disabilities, which resembles that in 21 Jac. 1, c. 16. And the real ground for pleading that statute of limitations specially was, that the exceptions in sect. 2, in favour of persons disabled by infancy, coverture, idiocy, &c. might not be rendered useless, and they taken by surprise at the trial, by finding the statute of limitations there first relied on (*d*). Not only is there in the present case a like, but a stronger reason for compelling the parties to put the new statute of limitations on record, when the right as well as the remedy is taken away for the first time

(*a*) 1 N. R. 56. *Silly* v. *Dally*, Easter Term, 10 W. 3, Carthew, 445, semb. cont.; See 2 Mod. 70, 71; 16 Vin. 459; 3 Salk. 220; 1 Saund. 284 n. (*d*); 3 Salk. 307; cited 1 Bos. & P. 361 n.; Com. Dig., Pleader, (C. 36); *Soane* v. *Ireland*, 10 East, 259.

(*b*) See this section, ante, p. 552, note (*e*).

(*c*) 3 & 4 W. 4, c. 27, s. 16, is as follows:—"Provided always, and be it further enacted, that if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid [ss. 2, 14], such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died, which shall have first happened."

(*d*) 1 Saund. 283, note 2.

by its positive enactment in sect. 34. In a case on 21 Jac. 1, c. 16, where the declaration disclosed that the cause of action accrued more than six years before, the Court still held that the statute must be pleaded; moreover, that the plaintiff might have an opportunity to reply an original sued out within six years after the cause of action accrued. *Gould* v. *Johnson* (*a*). Even before *Chapple* v. *Durston* (*b*), the practice was to plead and reply the statute of limitations specially in debt as well as assumpsit. So, in equity, the statute of limitations must be put on the pleadings, either by way of plea or answer. *Prince* v. *Heylin* (*c*). So far as the course of pleading since 3 & 4 Will. 4, c. 27, has weight, it has been always considered right to plead that statute in bar in replevin, by analogy to the old law. *James* v. *Salter* (*d*); *Grant* v. *Ellis* (*e*). So, it has been replied specially in trespass, to a plea of entry by the defendant. *Holmes* v. *Newland* (*f*). [*Parke*, B.—In *James* v. *Salter* it had become necessary to plead specially in bar, as the avowry set out a will and relied on it. The plaintiff's counsel need not answer this point.]

Whateley and *Carrington*, contrà.—No case has yet occurred which is exactly in point; but it is clear that sections 2 and 3 are to be read together. [*Alderson*, B.—Their terms differ in some degree. There is no difficulty in construing sect. 2 adversely to you; but there certainly is a difficulty arising on sect. 3, though it is not easy to see that the defendant, by having *omitted* to bring an action, or make a distress, for more than twenty years, has been dispossessed, or discontinued his receipt of the rent.] The plaintiff contends, upon sect. 3, that the defendant discon-

(*a*) 2 Ld. Raym. 838.
(*b*) 1 C. & J. 19; 1 Saund. 283, note (2).
(*c*) 1 Atk. 493; see *Collins* v. *Goodall*, 2 Vern. 235.
(*d*) 3 N. C. 545, 550; S. C. 2nd edit., 505, 507.
(*e*) 9 M. & W. 113.
(*f*) 11 Ad. & E. 44.

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tinued the receipt of this rent from the time at which it was last received, viz. 13th January, 1825, so as to make the distress in May, 1845, too late. That section is not a mere interpretation clause, but governs sect. 2, and decides this case. The case of *Lessee, Mannon* v. *Bingham* (*a*) is strongly in point for the plaintiff. It is thus stated in Mr. Shelford's "Real Property Statutes," 4th edit., p. 140: "In a recent case in Ireland, of a lease for lives, at a rent above 20*s*., (see sect. 9), with the common condition of re-entry, it was held, that the landlord could not maintain ejectment for non-payment of rent after the tenant had been more than twenty years in possession without paying rent to the landlord or any other person, a right of entry having accrued more than twenty years before. The case of *Doe* d. *Davy* v. *Oxenham* (*b*) was cited, and the Court was strongly pressed with the anomaly of the landlord's being entitled to recover the possession at the end of the term, or within twenty years after, and yet being unable to avail himself of the condition of re-entry in the subsisting lease. The Court, however, after much deliberation, while they recognised the propriety of the above decision of the English Exchequer, and admitted the existence of the anomaly, yet stated that they felt bound by the language of the enactments, which they thought clear on the subject." As to rents payable every twentieth year, no such cases are known in practice. [*Alderson*, B.—An old forfeiture of twenty years' standing would be within the act. The forfeiture in question sprung, originally, out of the non-payment of rent; but whether it had arisen more than twenty years before does not appear.] The case cited shews that the Irish court of Common Pleas must have held the rent to be extinguished. [*Alderson*, B.—They in fact controverted *Doe* d. *Davy* v. *Oxenham*,

(*a*) Trin. 1841, C. B., Ireland; Smythe's Law of Landlord and Tenant in Ireland, 676.

(*b*) 7 M. & W. 131.

ugh they are reported to have stated otherwise. What omes of the last, or twentieth, year's rent?] *Grant* v. *is* and *Doe* v. *Oxenham* both turned on the meaning of word "rent." [*Parke*, B.—You say that the defend- "discontinued" the receipt, and, if so, that the statute o run from the last time of any actual payment. That istruction, if it clears the question of grammatical em- rassments, introduces all those of another kind. *Rolfe*, —Had the owner of the rent died between Michael- s, 1824, and Michaelmas, 1825, you would have stated n, in pleading, as having been in receipt of the rent en he died; for he had received the rent due at Michael- s, 1824. Suppose he died after Michaelmas, 1825, no er person but his heir could have the rent. Your ar- ment excludes all the savings for disabilities; so that, posing the owner to have been a feme sole on the day last payment was made, and to have married, or be- ne lunatic, the rent would be equally extinguished, her at Michaelmas, 1844, or on the 15th of January, 45, whether she was guilty of any laches or not. *rke*, B.—If the Statute of Limitations once began to n, it would continue to do so, notwithstanding an inter- ning disability (*a*), which may be an answer to that ficulty. *Rolfe*, B.—Your calculation of the period at ich the statute begins to run, from Michaelmas 1825, rows out of the case all the enactments in sect. 16, specting disabilities, an inconvenience which does not ise if the statute is held to begin to run from Michael- as 1824. *Alderson*, B.—If we take the literal and plain nstruction of sect. 2, we shall escape from the difficulties which sect. 3 would plunge the case with reference to e savings for disabilities. By sect. 8, the right of the rson entitled to make entry or distress is to be deemed have first accrued at the determination of the first of ch years, or other periods, *or* at the last time when any

(a) See *Doe* d. *Duroure* v. *Jones*, 4 T. R. 311; 1st Sel. N. P. 145; 2nd vol. 733, 10th edit.

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rent payable in respect of such tenancy shall have been received, *which shall first happen.*] That is in the plaintiff's favour, for no such words are found in sect. 3. The rule of acting on modern statutes is, to adhere to their words as far as possible. As to the meaning of *discontinuance* to receive rent, it is the reverse of continuing to do so. If the owner does discontinue receipt of rent, the last time he receives it is the time of discontinuance from which the statute runs. [*Alderson*, B.—The right to distrain, by sect. 3, first accrues at the time of dispossession, (as it seems, of the land), *or* at the last time at which any such rent was received. We must try to make sense of these enactments, and to give effect to the spirit of them, as far as their words will admit.]—*Banks* v. *Angel* (*a*) was also mentioned.

Cur. adv. vult.

In Easter Term (April 20) the judgment of the Court was delivered by

PARKE, B.—The question in this case turns entirely on the construction to be put on the 2nd and 3rd sections of the Real Property Limitation Act, 3 & 4 Will. 4, c. 27.

The facts of the case are very short. The defendant was entitled to an ancient quit rent, payable annually at Michaelmas, out of certain land held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on the 15th of January, 1825. No rent was paid after that date, and on the 15th of May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844; and the question is, whether, at the time of the distress, his title to this rent had been extinguished by lapse of time.

The Court has already given its opinion, that, if it was, the pleadings are proper.

The second section of the act, so far as it applies to the

(*a*) 7 Ad. & E. 843. See 12 Ad. & E. 341.

esent case, enacts, that no person shall make an entry or stress, or bring any action to recover any land or rent, it within twenty years next after the time at which the ght to make such entry or distress, or to bring such action, st accrued to the person making or bringing the same. this case, as all rent was paid up to Michaelmas, 1824, distress could have been made prior to Michaelmas, 325. Therefore, if the question depended entirely on this nd section, the distress made in May, 1845, i.e., within enty years from Michaelmas, 1825, would seem to have een made in due time. But the question does not turn exlusively on this section; for, in the 3rd section, the Legisature, apparently considering that difficulties might exist s to the exact point of time from whence the twenty years hould begin to date, has proceeded to fix that point in any, if not in all, possible cases. The language of the third lause, so far as it is applicable to this case, is as follows:— "And be it further enacted, that, in the construction of his act, the right to make an entry or distress, or to bring n action to recover any land or rent, shall be deemed to ave first accrued at such time as hereinafter mentioned, hat is to say, when the person claiming such land or rent hall have been in possession or in receipt of the profits of uch land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued uch possession or receipt, then such right shall be deemed o have first accrued at the time of such dispossession, or iscontinuance of possession, or at the last time at which ny such profits or rent were or was so received." Here he defendant was, up to 1826, in receipt of the rent in uestion, and afterwards discontinued such receipt; so that e comes precisely within the description of the persons eferred to in the first branch of the statute; and the quesion is, whether, in such a case, the statute meant absotely to fix the point from which the twenty years are to ake, at the day on which the last payment of rent was

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made, or to enable the party claiming to calculate from that date, or, at his option, from the time when he discontinued the receipt of the rents. We think the former is the true construction, and that, in the case of rent, the calculation must always be made from the last actual receipt. Although the clause in this branch of it seems to present an alternative, viz. either the discontinuance of possession or the last actual receipt; yet we think that, in truth, no alternative is contemplated.

The statute, it will be observed, provides, in the same sentence, both for the case of land of which a party has been dispossessed, and for that of rent which he has ceased to receive; and the sentence must be read, not as giving in either case a choice, but reddendo singula singulis, i.e., fixing the actual moment of dispossession, or discontinuance of possession, as the point from which the twenty years are to run, in the case of land of which a party has, at some moment of time, ceased to be in actual possession, and the last actual payment of rent, as the point from which the twenty years are to run in the case of a party ceasing to receive rent. The object of the legislature seems to have been to fix a point, the exact position of which should be perfectly clear, rather than one which should, abstractedly considered, be the most just.

The last payment, in the case of rent, is a point of time which could admit of no doubt; whereas the time at which a party has discontinued the receipt of rent is obviously a point of time very difficult to ascertain. When does a party entitled to rent "discontinue" its receipt? Does he do so by not receiving it on the day on which it is due? Or, if not, how soon afterwards? There would be very great difficulty in fixing any such point. Add to which, the expression, in this part of the clause, is not discontinuance of *receipt*, but discontinuance of *possession*; language which appears to us to apply to the case not of rent but of land.

It must not, however, be overlooked, that there are diffi-

culties in this construction. In the first place, the twenty years are thus made to comprise a space of time during which the party could not have instituted any proceedings, and during which, therefore, he is guilty of no laches in not instituting legal proceedings. The general principle of the Statutes of Limitations has been to fix the period during which a party having a right to institute legal proceedings may exercise that right, and that principle, in the clause now under consideration, is fully adhered to in the case of land. A person dispossessed of land is allowed twenty years from the time of his being dispossessed, and during all that period he may bring his ejectment. But a person disseised of rent has (according to the construction we adopt) only twenty years from the last payment; and so if an annual rent has been paid on the day on which it is due, and afterwards unjustly withheld, the party aggrieved has only nineteen years instead of twenty, during which he can bring his action or distrain; for during the first year of the twenty it is plain that he has no right of distress or action at all. This is undoubtedly an anomaly, but it must still exist in many cases, whatever construction we put on the branch of the third section now under consideration; for the second branch of the same section provides for the case of a party dying seised of a rent, and enacts that in such case "the right of the heir or devisee to make a distress, or bring an action, shall be deemed to have first occurred at the time of the death of the party dying; and it is plain that the period of twenty years may thus include time during which no right of action or distress will have existed; and the same objection applies to the other branches of the third section, which provide for the cases of parties claiming by purchase, parties claiming reversionary interests, and persons claiming under breaches of condition. It applies also to the very common case of tenancies from year to year, provided for by the eighth section, where the end of the first year of the tenancy, or the last

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payment of rent, is declared to be the time when the right first accrues; and yet there is not necessarily any right to enter at either period.

Another difficulty was pointed out and much insisted on at the bar, namely, that, on the construction which we adopt, great injustice would necessarily result in the ordinary case of heriots and other similar rights, which become due at uncertain intervals; and also the possible, though not very probable case of a rent reserved payable every twenty years, or at a longer interval. In such cases, if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or laches whatever, when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases. But as to heriots, probably the answer to this objection may be, that in a case similar to that now before us, the word "rent" would not include heriots—for though by the interpretation clause the word "rent" is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding that in the clause now under consideration the word "rent" does not include heriots. A similar observation may be made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in the second section, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all, and is left in the same condition as if the act had not passed.

The same answer certainly cannot be given to the case of rents reserved payable at intervals of twenty years, or less, in which the time, upon our construction, must be much shortened. It may, however, be very doubtful, whether in

ct any rents payable at such large intervals do exist, and ven if there are any such, we do not think the argument erived from their existence can affect the question, condering that, whatever interpretation we put on the first ranch of the section, it is quite certain that, in all the other ranches of it, the anomalies and difficulties pointed out nust exist.

The last objection insisted on was founded on the 16th section, which saves the rights of infants, femes covert, lunatics, and other persons under disabilities. The clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action first accrued; and if this be held to be the time when the last payment was made, the protection will, in many cases, be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives; if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but, certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases may be pointed out. This is, no doubt, a very serious defect, and would afford strong grounds for adopting any reasonable construction of the third section by which it might be remedied. But no construction would have that result; for, even if by a forced and difficult construction of the sixth branch of the section, we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear; yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised and leaving an heir not under

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disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under a settlement, who may be a feme sole when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the third section. The same thing may be said of the eighth section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act on the plain and natural construction of the language of the third section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment was made, and so that the distress made in May, 1845, was unlawful, all right to the rent having been extinguished before that time. The rule must therefore be made absolute (*a*).

[It being stated for the defendant, that, as the learned Judge at the trial was of opinion in favour of the defendant, he had had no opportunity of tendering a bill of exceptions, so that, as he could not distrain again, he would be altogether concluded by the above judgment from carrying the question into a court of error, the Court inclined to grant a new trial on payment of costs, but intimated that the best course would be for both parties to consent to a special verdict, which was afterwards agreed to on terms.]

(*a*) See *Sanders* v. *Coward*, 16 M. & W. 48.

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The ATTORNEY-GENERAL *v.* HALLETT. *Feb.* 9.

HIS was an information in the nature of a bill, filed by e Attorney-General on the part of the Crown, for an in- nction to restrain the defendant from cutting down trees d underwood growing in Kington Wood, in Essex. It ated, that, in Hilary Term 1846, the Attorney-General had ed an information against the defendant, stating, in sub- nce, that Her Majesty, in right of her Crown, was seised of e forest of Waltham, in the county of Essex, and that she l all her ancestors, kings and queens of England, had ntinually held and enjoyed the said forest, and the game wild beasts and fowls of forest, chase, and warren, ning and arising of and from the said forest, and all hts, franchises, &c. appertaining thereto, without any sturbance, title, or claim made thereto, until the commit- ng of the offences after mentioned, and still of right ght to have and enjoy the same, &c.: yet that the de- ndant had, in 1844, encroached on the soil of the rest, by unlawfully erecting a fence and digging a ditch pon the soil thereof, and thereby had inclosed for his own se, and divided from the residue of the forest, a consi- erable extent of the soil thereof. The defendant pleaded o this information, and the Attorney-General demurred to is pleas; and, in last Hilary Term, the demurrer was ar- gued, upon which the Court had postponed its judgment. The present information then stated, that the said Richard Hallett had very lately commenced cutting down nd clearing away all the holly trees and underwood that part of the forest called Kington Wood, which

An information filed by the Attorney-General suggested that an information had been previously filed against the defendant for an encroachment by him on the royal forest of Waltham, by inclosing land therein (about twelve acres) with a ditch and fence; and that pending the judgment of the Court on a demurrer in that cause, the defendant had very lately commenced cutting down and clearing away all the holly trees and underwood on the land so inclosed by him; such trees, &c. being part of the vert and covert of the forest. The present information prayed that the defendant might be restrained from cutting any more trees or underwood growing within the forest. The answer stated that the defend- t was seised in fee of the locus in quo by having bought it three years before; that it was not rt of or within the forest, and that he cut the holly-trees and underwood at the proper season, d in the course of the proper management of the estate, as it had been cut for the last twenty rs:—*Held*, that the vert of a forest is a necessary part of it; still as no irreparable injury to vert was shewn in this case, the act of the defendant, assuming the locus in quo to be within forest, was a trespass in the nature of waste, which might be compensated in damages, and erefore that no injunction could be granted.

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were and are growing on that part of the forest which had been encroached upon and inclosed by the defendant, and sold and disposed of the said trees and underwood for his own profit, and that he had threatened and intended to cut down all the other trees and underwood standing within that part of the said forest which he had so encroached upon and inclosed; that the trees and underwood cut down and threatened to be cut down form part of the vert and covert of the said forest, and that the property of the trees within the said forest, that form part of the vert and covert thereof, is vested in her Majesty. The prayer of the information was, that the defendant might be restrained from cutting or clearing away any more trees or underwood growing within the forest. Affidavits sworn on the 29th January, and filed on the 2nd February, and used in support of the information, alleged, that on and before the 19th January, 1847, the defendant had begun to cut down holly trees and underwood, bushes, willow and other trees, in Kington Wood, and had threatened to cut down every thing standing within a space of about 60 yards wide, and more than a quarter of a mile long. On the 3rd February a notice of this motion, intitled as "Between her Majesty's Attorney-General," informant, and the defendant, by English information, was given to the defendant by the solicitor of the Board of Woods and Forests.

By his answer, filed 6th of February, 1847, the defendant first denied the encroachment charged, and stated that the information of Hilary Term, 1846, was filed against him by reason of his having repaired a fence and ditch belonging to, and situated on, an estate called Kington Wood, of which he was seised in fee, and which was not part of the forest or within it; that that information alleged that the place where the fence and ditch were was parcel of the forest, and that the pleas demurred to denied that allegation; that the defendant, at the proper season, commenced cutting the said holly trees and

underwood, and had frequently cut them without hinderance during the three years for which time the estate had been his property; that they had been cut in like manner by former owners, during twenty years and upwards, and that he had been informed, and verily believed, that they had been cut in like manner by the owners of the estate called Kington Wood, during a much longer period back, and that the cutting of the holly trees and underwood was proper and seasonable, and in the course of the proper management of the estate (*a*).

The *Solicitor-General* and *G. B. Maule*, in support of the motion.—The question now pending for the judgment of the Court, on the information of Hilary Term, 1846, is, whether the estate of the defendant is parcel of the forest; and the further waste complained of in this information has been committed during the time taken by the Court to deliberate on that question. [*Rolfe*, B.—The defendant denies that Kington Wood is part of the forest, and therefore denies that it is in the Crown. Then the ordinary, if not the invariable rule in equity is, that where title is bonâ fide in dispute, there cannot be an injunction pending the suit.] The forest law here applies. The defendant admits that he is cutting down the wood on his estate; now, if that estate is not in the forest, the defendant's inconvenience, in being enjoined from cutting it down in the interval pending the judgment of this Court, is small compared with the injury sustained by the Crown, if the defendant's estate proves to be within the forest, and yet the defendant is permitted to cut it down. An injunction pendente lite is all that is asked; the defendant can only suffer a little delay. The injury to the Crown is irremediable; it will lose all the vert, for the trees and underwood are vert. A royal forest "est tuta ferarum mansio,

(*a*) See *Hampton* v. *Hodges*, 8 Ves. 105.

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non quarumlibet, sed silvestrium, non quibuslibet in locis, sed certis et ad hoc idoneis; unde foresta E mutata in O quasi foresta, hoc est, ferarum statio." *Ockam*, cap. "Quid regis foresta," cited Co. Litt. 233. a. A forest consists of soil, covert, laws, courts, judges, officers, game, and certain bounds. 4 Inst. 289. "Vert or viridis, verd, greenhue," falls under the term "covert." Manwood (*a*), 3rd edit., chapters 6 and 8, pl. 1, in speaking "of the woods and coverts of a forest, and of their differences," says, "it hath been already declared before that every forest must, of necessity, be replenished with wood great and coverts, for the succour of the wild beasts, both of the forest and chase, and therefore the laws of the forest specially provide for the preservation of their woods and coverts, whether they be the woods of the king or of any other person; so that if any man cut wood within the forest, although that the soil whereon those woods do grow be his own freehold, yet he may not cut down or fell his woods and coverts there." Lord *Coke*, in 4 Inst. 289, thus describes it: "Viridis, greenhue, a viriditate; the French calleth it verd, and we vert; whatsoever beareth green leaf, but specially of great and thick coverts. And vert is of divers kinds, some that may serve as well for food of men as of beasts, as pear, chestnut, apple, service, nut and crab-trees, &c., and for the shelter and defence of the game: some called hautboys, serving for food and browse of and for the game, and for the defence of them, as oaks, beeches, &c. Some hautboys for browse and shelter and defence only, as ashes, poplars, &c." He then mentions other trees and bushes as being also vert, including brakes, gorse and heath, as fit food, shelter, or hiding of the beasts of forest, and adds, that herbs and weeds, though green, are not vert. Manwood treats holly trees as "over vert," or haut-bois (*b*), and shews that every tree which grows within a forest, even on arable land there, whether haut-bois or sub-bois, is vert,

(*a*) Chap. 8, pl. 1, p. 134. (*b*) 3rd edit. 121, chap. 6.

being in the king's possession (a). [*Parke*, B.—There is no doubt that woods are a necessary part of a forest, for there is no shelter for the beasts of forest without it. If all the vert were destroyed over the whole forest, there might be an end of the forest so far, for without wood there would be no shelter for the beasts of forest. The question is, whether, in this case, such an irreparable injury, in the nature not of mere waste but of destruction, has been committed or threatened, as will induce this Court to interfere, supposing there is a fair question of title. The defendant does not say that the Crown has a forest there, or that if the particular spot were part of the forest, the trees cut down would be vert.] By the forest law, a man who is owner of freehold land within a forest, may not cut down trees there. Injunctions to restrain parties holding lands in the forest, but not owning the fee, from cutting wood growing on their lands, have often been granted at the suit of the Attorney-General. The defendant was about to make a clearance of the whole land. [*Alderson*, B.—The test by which an injunction will be granted or refused is, whether the act complained of is an irreparable injury (b), or a trespass only. Now grubbing up the underwood is not charged, and on cutting it to the germins, the defendant left the stumps to grow again (c); the taking the crop of underwood would not be an irremediable injury to the subject-matter, for it would grow up again. This is an application in equity. Now, in equity, if a wood is claimed in ejectment against a party in possession, no injunction lies in general against him for cutting it.] The locus in quo is not the simple wood of an individual, it is a royal forest. By the mere act of cutting the wood the covert is lost to the deer, so that as to them the injury is for several years

(a) 3rd edit. 121, chap. 6.

(b) See *Cowper* v. *Baker*, 17 Ves. 128: case of nodules of clay found in the sea.

(c) See Manwood, 3rd edit., 147, 148.

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irreparable. [*Parke*, B.—Were the whole forest cut down, the injury would be irreparable (*a*), but is this injury to a part more than a trespass?] Though this piece of land may be small, other parties in the defendant's situation may each cut down the trees on his land, so as to destroy the whole forest gradually. Manwood, in chapter 8, pl. 4, "as to what shall be said to be waste by the laws of the forest," says, "to fell or cut down any covert or coverts of woods in the forest, without license, although that the same be growing in a man's own lands of inheritance, is so great an offence to the forest, that the same not unworthily taketh the name of a waste of the forest." [*Parke*, B.—Still the question is, whether the locus in quo is part of the forest. Suppose ejectment to be brought for meadow land, no injunction would lie to prevent a party from converting it into arable land pending the cause. *Alderson*, B.—This act on land within a forest would, without doubt, be waste. The question is, whether, pending a trial of a fact as to title, we should grant an injunction. We restrain a tenant who has covenanted not to convert meadow into arable, because there is no question of title. If the Court should decide that this land is part of the forest, an injunction would be immediately granted. If an ejectment were brought for a house, the Court would probably grant an injunction to prevent it from being pulled down, or its character from being entirely changed. If the defendant admitted his lands to be within the forest, but claimed a right to cut down the timber, the case would be different; here he denies that the land is parcel of the forest. *Parke*, B.—We are all agreed that cutting down the vert is waste, and a destruction, pro tempore, of the forest, though it may be repaired when the germins grow again.] The forest law is quoad

(*a*) See *Thomas* v. *Oakley*, 18 Ves. 186, as to taking away coal, the substance of the inheritance; and *Bourne* v. *Taylor*, 10 East, 189. See *St. John's College* v. *Carter*, 4 Mylne & Craig, 497.

royal forests part of the common law. The word "waste" is differently interpreted by the forest law. Again, Manwood draws a distinction between waste and destruction in a forest (*a*). [*Alderson*, B.—All that admits the land held by a subject in severalty to be within the ambit of the forest.] Suppose the Crown to succeed in obtaining judgment, it has in the meantime, and for many years, lost the covert and food for its deer. Manwood says (*b*), "And if a man do fell his woods, which are coverts within a forest, without license, and yet doth so enclose and fence those woods round about, that they are well preserved to grow again, and that in a short time, then that shall be a waste of the forest, forasmuch as the covert of the forest is thereby lessened and wasted. For, as it is held at the common law, that if a tenant for term of life do cut down woods and fell them, that is a waste, although that the same woods do grow again; even so it is by the forest law, that if a man do cut down a covert of a forest without license, the same is a waste of the forest, although that the covert doth grow again, forasmuch as the same felling of the covert shall, for a time, cause the exile and banishment of the wild beasts from that place." [*Alderson*, B.—Lord *Eldon* says, in *Hanson* v. *Gardiner* (*c*), "I remember when in a case of trespass, unless it grew to a nuisance, an injunction would have been refused, and even in the case of waste, if by temporary acts from time to time, merely the subject of an action, and not bringing along with it irreparable mischief. Lord *Hardwicke* thought it was granted only as following the relief. Lord *Thurlow* had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a demise of close A to a tenant for life, the lessor being landlord of an adjoining close, B. The tenant dug a mine in the former close. That

(*a*) Manwood, ch. 8, "Waste in Forests," pl. 4, 3rd edit. p. 147.

(*b*) Chap. 8, pl. 4, p. 148.

(*c*) 7 Ves. 305, 307.

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was waste from the privity. But when we asked for an injunction against his digging in the other close, though a continuation of the working in the former, Lord *Thurlow* hesitated much, but did at last grant the injunction; first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this Court enjoining on matter of trespass, where irreparable damage is the consequence (*a*). This led to *Robinson* v. *Lord Byron* (*b*), and the other cases in which also this principle operated, that, unless there was some jurisdiction to prevent it, there would be great failure of justice in the country. The ground of that case was irreparable mischief, and irreparable mischief that would have been done before there could have been any trial at law, as to the right claimed to let off the water. *Isaac* v. *Humpage* (*c*) is a case on its own particular circumstances, certainly not standing upon the notion of irreparable waste." According to that, unless something in the nature of irreparable waste is likely to occur during the time which may be occupied in trying the cause, the Crown ought to wait for its injunction. The cutting holly trees cannot, in this case, be made out to be irreparable damage by forest law, because the question of title, whether it is part of the

(*a*) In *Thomas* v. *Oakley*, 18 Ves. 186, Lord *Eldon* says: "I have frequently alluded to the case upon which Lord *Thurlow* first hesitated:" then, after restating the facts of the case of *Flamang*, adds, that in the result Lord *Thurlow* held "that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the Court is to prevent your having that which is his estate. Upon that principle Lord *Thurlow* granted the injunction as to both [closes, viz. that demised, as well as that not demised to the defendant]. That has been since repeatedly followed [see *Mitchell* v. *Dore*, 6 Ves. 147]; and whether it was trespass under the colour of another's right actually existing or not."

(*b*) 1 Bro. C. C. 588.

(*c*) 3 Bro. C. C. 463; as to which see note in 1 Ves. jun., 431.

rest, is not yet decided. If it should follow from the dgment of the Court that it is, doubtless an injunction ust be granted.] Suppose a man to sue in ejectment for house, claiming absolute title to a fine ancient room in it, ould not an injunction be granted, if the person in possesion threatened or began to alter its antique character, hich was incapable of restoration? [*Platt*, B.—There ne subject case of controversy would be agreed on, as eing a room. Here it is doubted whether this land is art of the forest. *Alderson*, B.—Had the defendant admitted the land to be within the ambit of the forest, and claimed a right nevertheless to cut down timber or vert there, that destruction would be an irreparable injury to the rights of the Crown over that land.] Manwood proceeds, p. 150, "And as at the common law, if a tenant for term of years do willingly suffer a meadow to be drowned with water, whereby the same doth become full of rushes and barren, or if he do plough up his meadow land and make the same arable land, that is said to be a waste, so likewise, if a man have a meadow ground or pasture lying within the King's forest, without the covert of the forest, and the owner of the same doth plough up his meadow or pasture ground, which hath not been usually ploughed nor sown before, and so convert the same into tillage, it shall be said to be a waste of the forest." Again, in chapter 9, speaking of "Assarts of a forest," he says, "Even as a waste by the laws of the forest is accounted one of the greatest offences or trespasses that can be done to the vert of the forest, because the same is a felling down and destroying of the thickets and coverts of a forest, that is to say, the vert or greenhue, be it great wood or underwood, bushes, thorns, or any covert that beareth green leaf, so likewise an assart of the forest is the greatest offence or trespass of all others, and there is none like unto it that can be done unto the vert of the forest, for every assart of a forest doth contain in it

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a waste and destruction of the vert and covert of the forest, and more, for whereas a waste of a forest is but the felling or cutting down of the coverts, which may grow again and become covert in time, an assart is the plucking up by the roots of those woods which are thickets or coverts of the forest, to make the same pasture or arable land." Bishops and incumbents, having qualified fees in their sees and glebes, have been restrained by injunction at suit of the patrons, for cutting trees or digging stones there: *Knight* v. *Moseley* (*a*). Suppose such defendants set up a title in themselves to the trees or quarries, in a right independent of their sees or benefices, would the injunction have been refused? [*Rolfe*, B.—As the defendant, in the case cited, did not answer, but demurred, he admitted a part of the waste committed, so that the point now put is not there decided.] The setting up title to stock would equally prevent an injunction against selling it out. In *Lowther* v. *Stamper* (*b*), Lord *Hardwicke* refused an injunction to stay waste in digging a coal mine, till the answer was come in, or the defendant had made default in not putting in his answer, because it appeared that the defendant set up a right to the inheritance of the estate in which the mines were dug. Here the answer is put in. [*Alderson*, B.—In Lord *Hardwicke's* time injunctions were not granted as they have subsequently been. The whole of that practice seems to have arisen out of the common law writ of estrepement, to prevent injury pendente lite, in an action of waste (*c*) by a tenant, where there was privity of title. It has been only extended to cases of trespass in which irreparable injury would otherwise have been done.] In *Kinder* v. *Jones* (*d*), an injunction was granted to prevent trees from being cut down, though the title was in dispute. [*Rolfe*,

(*a*) Amb. 176.
(*b*) 3 Atk. 496.
(*c*) 3 Bla. C. 225; 3 Stephen's Comm. 507.
(*d*) 17 Ves. 110.

B.—There the timber was ornamental, so that the injury would have been irreparable. Here there is no timber, but holly trees only. There may, however, be no distinction between the cases in principle. The acts of waste stated in the affidavit are the same alleged generally in the bill (*a*).] In the 4th edition of Mitford on Pleading, p. 135, there is this passage: "Pending litigation the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interpose to preserve it, if the powers of the court in which the litigation is pending are insufficient to the purpose. Thus, during a suit in an ecclesiastical court, for an administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased, till the litigation is determined, although the ecclesiastical court, by granting administration pendente lite, will provide for the collection of the effects. And pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, ploughing ancient meadow, or otherwise. Against this inconvenience a remedy at the common law was in many cases provided, during the pendency of a real action, by the writ of estrepement; and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect." And, in page 137, "Doubts have been suggested how far a court of equity ought to interfere to prevent injury arising to property pending a suit founded on trespass. This doubt, it should seem, ought to be confined to cases of mere trespass, and where the injury done is not probably irreparable. But where a doubtful right has been asserted in a manner productive of irreparable injury, the

(*a*) See Daniel's Chancery Practice, 289, 356.

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courts have interfered." The case of *Hanson* v. *Gardiner* (a), and cases of cutting timber and digging mines, are then stated. Here the answer, though it denies the title of the Crown, admits the title is in dispute. [*Parke*, B.—It does not say the claim of the Crown is mere pretence, and without weight or value. The Crown is never out of possession, but to what period would damages be recoverable if the information succeeded? *Alderson*, B.—Here the Crown has no estrepement, but damages in lieu of it, which may not be equivalent to the injury.] Injunctions to prevent dealing with property, during suit affecting it, are common, e. g. with regard to money in the funds or bills of exchange. [*Alderson*, B.—If a bill of exchange is handed over to a third party for value, he would have a title to it, therefore the injury would be irreparable, for, as far as the contending parties are concerned, the bill would be destroyed.] The principle is the same here; no damages can compensate for the injury. In one case the injunction went against carrying away manure from a farm, which would injure it for a considerable time. In *Jones* v. *Jones* (b), Sir *W. Grant*, M. R., said, "I do not see a very good reason why this Court, which interferes for the preservation of personal property pending a suit in the ecclesiastical court, should not interpose to preserve real property pending a suit concerning the validity of the devise."—*Whitechurch* v. *Holworthy* (c) was also mentioned.

Willes, contrà.—Nothing appears on the face of this information upon which the Court will grant the injunction prayed. The defendant's answer shews that what is charged as making a fence and ditch is only a repair of old ones. [*Alderson*, B.—The making the fence and ditch is not an

(a) 7 Ves. 350.
(b) 3 Mer. 173.
(c) 4 M. & Sel. 340; 16 Ves. 212, S. C.

ırable injury. They might be easily destroyed.] Then ıtting the hollies was at the usual season and in the r manner. [*Alderson*, B.—Nothing is said about timıroughout.]—He was then stopped by the Court.

RKE, B.—We are all agreed that this is not a case in ı the Court can interfere by injunction before trial. principle upon which our refusal proceeds is, that an ction is not granted in the case of an ordinary trespass; gh in instances where, looking at all the circumstances, pears that the act complained of or threatened falls r the description of irreparable injury, it will. The ıdant's act of cutting the vert will amount to waste, if lands on which it grew are within the forest; but, g the information and answer together, it has not been n that the cutting it at the particular spot, in the manınd to the extent alleged, nor in the ordinary course in h it has been cut for twenty years past by the defendınd his predecessors, without interruption by the Crown, d be irreparable injury to the forest, viz. such an inas could not be compensated in damages. No authority een cited to satisfy us that the Court should interfere ıch a case as this; and in the absence of express autho- I think we ought not to grant the injunction prayed.

LDERSON, B.—I am of the same opinion. I take the ıing of irreparable injury to be that which, if not preed by injunction, cannot be afterwards compensated ıny decree which the Court can pronounce in the reof the cause. The case of the wrongful exhaustion mine in the course of a suit, is such an instance (*a*), ıo decree can restore it in its original primary state to ›wner. But there are no such circumstances here. It

(*a*) See ante, p. 575.

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was not, nor could it be contended, that the party in possession of land within a forest may not cultivate it, take the grass or corn, or cut underwood in the ordinary course, though his title may be disputed by the Crown. If extraordinary damage was to be apprehended, the Court would prevent it by its interposition. Here, however, the defendant has done no more than has been done by his predecessors during the last twenty years, and in his answer states that he bought the trees and underwood upon the locus in quo separately, at a valuation, for £500.

ROLFE, B.—I am of the same opinion, as to the result of the waste alleged. Originally the practice of granting injunctions was confined to cases where there was privity between the parties, though, as pointed out by Lord *Eldon* in *Hanson* v. *Gardiner* (*a*), it has been gradually, in the course of ages, extended to cases of mere trespass, and, in some instances, even to those of disputed titles. But I do not apprehend that Lord *Redesdale*, in that passage of his work (*b*) cited by Mr. *Maule*, meant to say that Courts will interfere in cases where the title set up by the plaintiff is disputed by the defendant, unless there is a bonâ fide subject of litigation, and the reasonable apprehension of great damage, amounting to irreparable injury, being done to the property in question in the meantime, if the Court does not so interfere. But, in this case, taking the pleadings on both sides together, it is not even suggested that irreparable injury would result from the defendant's acts. It is merely suggested that he is cutting down "all the holly trees and underwood," and is proceeding to sell them. The defendant's account of that is, that he has done the same thing every year for three years, and that his predecessors have done it every year for the last twenty years, and as he

(*a*) 7 Ves. 307. (*b*) Mitford on Pleading, 4th ed., p. 135.

erily believes, for many years before. Of course, if these cts have been done without right, and by encroachment on he Crown, it may assert its title by information. But rithout going so far as to say that there may not be cases n which the Court would interfere by injunction, where no ompensation in damages could be given, or even where it ould, it is enough to say that I do not think this is such a case. It should be recollected that irreparable injury may, in many instances, be occasioned as easily by granting as by refusing an injunction.

PLATT, B.—The bill does not suggest that any wilful spoliation of this property has been committed or threatened by the defendant; and taking the bill and answer together, it is clear that what the defendant has done, has been merely in the ordinary mode of enjoyment of the particular subject-matter during the last twenty years. By parity of reasoning, the cultivation of land within a forest, which had been usually cultivated as arable, might be interfered with during all the pendency of the suit. Again, if that cultivation, or the acts of the defendant here complained of, should turn out to amount to legal waste, the Crown would have its remedy in damages.

Injunction refused.

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Feb. 15.

BOULCOTT and Another *v.* GEORGE WOOLCOTT.

Assumpsit.—Declaration stated, that certain persons using the name and style of J. Boulcott & Co., by that name and designation drew a bill of exchange on Messrs. G. & E. Woolcott, and inclosed *the said* bill to defendant, who indorsed it to plaintiffs. Averment, that the drawees did not pay the bill when due. Plea, that the plaintiffs were and are the persons mentioned in the count as using the name and style of J. Boulcott & Co., and as so making the bill by it; and that the indorsement of it to defendant was in fact an indorsement by plaintiffs in the said name and style of J. Boulcott & Co., and that they so indorsed it to him *before* he indorsed the same to them, averring that at the time of his so indorsing the bill to plaintiffs they were liable to pay the amount to him according to their previous indorsement. Replication, after setting out an agreement between the plaintiffs and defendant and G. & E. Woolcott, to forbear and give time to them respectively to pay another bill accepted by E. W., and afterwards indorsed to defendant, and by defendant to plaintiffs, till the time for payment of the bill declared on had elapsed, averred that plaintiffs had forborne to sue accordingly:—*Held* bad, on special demurrer, for departure from the declaration.

ASSUMPSIT. The declaration stated, that certain persons using the name and style of Joseph Boulcott & Co., by that name and designation, on 4th February, 1846, made their bill of exchange in writing, and directed the same to certain persons using the name and style of Messrs. G. & E. Woolcott, by that name and designation, and thereby required the said Messrs. G. & E. Woolcott to pay to the order of them, the said J. Boulcott & Co., 101*l.* 2*s.* 10*d.*, at one month after the date thereof, which period had elapsed before the commencement of the suit; and the said J. Boulcott & Co., by that name and designation, then indorsed *the said bill* to the defendant, who then indorsed *the same* to the plaintiffs, and the said Messrs. G. & E. Woolcott did not pay the said bill, though the same was presented to them on the day when the same became due, of which the defendant then had due notice.

Fifth plea, to the first count, that the plaintiffs were and are the said persons in the said count mentioned, as using the name and style of J. Boulcott & Co., and as so making the said bill by the said name and style, and that the said indorsement of the said bill to him the defendant, was in truth and in fact an indorsement by the plaintiffs in the said name and style of J. Boulcott & Co., and that in truth and in fact the plaintiffs did so indorse the said bill to him the defendant, before he indorsed the same to them, in manner and form as in the said count is in that behalf alleged: and the defendant further saith, that the plaintiffs were, at

he time when he so indorsed the said bill to them as in the aid first count alleged, liable to pay the amount thereof to im the defendant, according to the tenor and effect of the ame, and of their said previous indorsement thereof to him; nd that they, by reason of their said indorsement of the said ill to him, would be liable to pay him the amount thereof, pon his paying the same to them according to the tenor nd effect thereof.—Verification.

Replication.—That before the plaintiffs indorsed the said ill to the defendant, or the defendant indorsed the same to he plaintiffs, as in the plea mentioned, and before the same as made, and before the date thereof, and before the time or the payment thereof had elapsed, to wit, on 4th February, 1846, G. Woolcott the younger and E. Woolcott, o whom the said bill of exchange was directed by the names f Messrs. G. & E. Woolcott, and the defendant, were respectively indebted to the plaintiffs in £100, upon a certain ill of exchange in writing, dated 1st August, 1845, made y the said E. Woolcott, and directed to and accepted by he said G. Woolcott the younger, for the payment to the rder of the said E. Woolcott of 146*l.* 3*s.* 2*d.* at six months fter the date thereof, and indorsed by the said E. Woolcott o the defendant, and by the defendant to the plaintiffs, and hereupon it was then agreed between the plaintiffs, the efendant, and the said G. Woolcott the younger and E. Woolcott, respectively, that the plaintiffs should forbear nd give time for the payment of the said sum of £100 or a certain time, to wit, until the time for the payment f the bill of exchange in the first count mentioned had lapsed, and that in consideration thereof the said G. Woolcott the younger and E. Woolcott should accept, and he defendant should indorse, the bill of exchange in the rst count mentioned; and the plaintiffs further say, that in ursuance of the said agreement they made the said bill of xchange in the first count mentioned, and then indorsed

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the same to the defendant as in the first count mentioned, for the mere purpose of the defendant indorsing the same to the plaintiffs in pursuance of the said agreement, and there never was any value or consideration for the indorsement of the said bill by the plaintiffs to the defendant, or for the payment by the plaintiffs, or any or either of them, to the defendant of the amount thereof, or of any part thereof, and the defendant then indorsed the said bill to the plaintiffs in pursuance of the said agreement, and upon and for value and consideration to the amount of the said bill, to wit, the money so due from the said G. Woolcott the younger and E. Woolcott, and the defendant respectively, upon the said bill, and the forbearance of the plaintiffs as aforesaid; and the plaintiffs further say, that they did forbear and gave time for the payment of the said sum of £100 to the said G. Woolcott the younger and E. Woolcott, and the defendant respectively, until the period for the payment of the bill of exchange in the first count mentioned had elapsed.—Verification.

Special demurrer, assigning for causes, that, although in the first count the plaintiffs allege the defendant to have become liable to them solely by reason of his having indorsed to them the said bill therein mentioned, and by virtue of the custom of merchants, and according to the tenor and effect of his supposed indorsement thereof, and not otherwise, the replication discloses that the defendant's liability upon his said supposed indorsement is wholly dependent on a certain supposed agreement in the said replication stated and set forth as precedent to the making and indorsing of the said bill in the said first count mentioned, and that in so stating and setting forth the said agreement as the ground of the defendant's liability, the replication altogether waives and varies the cause of action disclosed in the said first count, and is a departure therefrom; and for that the said agreement should have been declared upon

n the first instance, instead of being shewn by way tion in an action on the said bill of exchange (*a*). · in demurrer.

, in support of the demurrer.—The declaration

re were other causes r: viz. that unless a ived in satisfaction, rment of it rather re- l right than creates a founded on *Kearslake* 5 T. R. 513, and cases *Mercer* v. *Cheese*, 4 M. *Maillard* v. *Duke of* [. & Gr. 40; *Wright* Q. B. 89; *Lumley* v. Bing. N. C. 9; *Brit- b*, 2 B. & Cr. 483. he replication should a distinct considera- prior bill, especially ıot in the common :irculation: see per J., *Fancourt* v. *Bull*, R., 645; 1 Bing., N. o, that the replication shewn that at some suit the first bill be- r was not paid before ore the bill in the ne due; see *Noel* v. M., & R. 360; 4 *Ther* v. *Rich*, 10 Ad. Also, that the gene- n of want of consi- : the plaintiff's in- ould not carry the re- yond the particular aid; *Atkinson* v. *Da-* & W. 236. Sixth at the agreement ıtated to have been *Case* v. *Barber*, Sir T. Ray. 450; *Adams* v. *Word- ley*, 1 M. & W. 374; T. & Gr. 820. Also, that the replication was an argumentative traverse of the allegation that plaintiffs indorsed to defendant, and should have ended with a special traverse of the allegation that plaintiffs were liable on their indorsement to defendant; see *Marston* v. *Allen*, 8 M. & W. 494; which is not inconsistent with *Hayes* v. *Caulfield*, 5 Q. B. 81; see *Bishop* v. *Hayward*, 4 T. R. 470. Also, that if the replication was good in form, it afforded no answer to the plea; *Britten* v. *Webb*, 2 B. & C. 483; for that it neutralized one right of action, and did not set up another, at least on the bill. In *Penny* v. *Innes*, 1 C., M., & R. 439; 5 Tyr. 107, the declaration was by plaintiff as drawer; *Burmester* v. *Hogarth*, 11 M. & W. 97, shews that it must be taken on the face of the declaration, that the bill and indorsements have been pleaded only to the legal effect, *Halsted* v. *Skelton*, 5 Q. B. 86; and if so, it appears that the plaintiffs in legal effect never indorsed at all; *Churchill* v. *Gardner*, 7 T. R. 96; *Prevot* v. *Abbott*, 5 Taunt. 786; *Cunliffe* v. *Whitehead*, 3 Bing. N. C. 828, 830.

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does not state, as it did in *Penny* v. *Innes* (*a*), that the plaintiffs drew the bill, but that J. Boulcott & Co. drew it and indorsed it to the defendant, who indorsed it to the plaintiffs. Thus the declaration does not disclose that the plaintiffs were drawers and indorsers. The plea is, that J. Boulcott & Co., the plaintiffs in the action, drew the bill, and indorsed it to the defendant before any indorsement by him. The replication goes into a new statement, to shew that the plaintiffs, under some other agreement, are entitled to sue the defendant on this bill, notwithstanding they had so indorsed it to him. Now this declaration upon it can only be supported by the custom of merchants; therefore it was a departure to set up, in the replication, a right to sue on any other ground. See Com. Dig., tit. Pleader (F. 8, 9). Again, by the custom of merchants, a prior cannot sue a subsequent indorser (*b*). That prevents the inconvenience of circuity of action in such cases.

The agreement set up in the replication shews a different ground of action from that on the bill sued on, for it goes to destroy the plaintiff's indorsement of it to the defendant, and to set up a new drawing of it by the defendant (*c*). It must be taken that the bill and its indorsements are declared on according to their legal effect (*d*). [*Parke*, B.—You say the replication goes to shew that the plaintiffs have no right to recover on the bill, or otherwise than on the agreement. But, by the indorsement, the plaintiffs made a new bill (*e*); so that if the objection of circuity of

(*a*) 1 C., M., & R. 439; 5 Tyr. 107.

(*b*) See *Britten* v. *Webb*, 2 B. & Cr. 483.

(*c*) See per Lord *Kenyon*, in *Bishop* v. *Hayward*, 4 T. R. 470.

(*d*) *Gibson* v. *Minet*, 3 T. R. 481; 1 H. Bla. 569; *Burmester* v. *Hogarth*, 11 M. & W. 97; *Halsted* v. *Skelton*, 5 Q. B. 86.

(*e*) See *Burmester* v. *Hogarth*, 11 M. & W. 97; *Gwinnell* v. *Herbert*, 5 Ad. & El. 439. In *Penny* v. *Innes*, 5 Tyr. 107, 1 C., M., & R. 439, the Court say expressly, that that case is "not as if plaintiff having indorsed to defendant, defendant had indorsed it back to him;" which is the principal case.

n were put an end to, as it was in *Wilders* v. *Stevens* (*a*), ›rior indorser might sue the subsequent one.] Sup- that a party who had accepted a bill was also the indorser, he never could sue a subsequent indorsee. *ke*, B.—He might sue every indorser, for each draws a bill. *Platt*, B.—Is not circuity of action got rid of '] The declaration treats the drawers as persons alto- r different from the plaintiffs. If it means that Boul- & Co. are the same as the plaintiffs, it is bad on the f it. [*Platt*, B.—If one man composed the firm of ›ott & Co., might he not be described as "certain ns?"] Here the declaration suggests a drawing and sement by persons other than the plaintiffs.

R CURIAM.—The declaration can only be supported on ssumption that the plaintiffs are different persons from ›ott & Co., for it would be bad if they were the same. plea alleges that they are the same; and this is said to lmitted by the replication, which, however, sets up ground for suing the defendant notwithstanding. raises the objection of departure, which is taken by ›ecial demurrer.

dgment for the defendant, if the plaintiff does not d the declaration or replication, and pay the costs, be- 15th April next.

illes for the plaintiffs.

(*a*) 15 M. & W. 208.

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BELLAMY *v.* BURCH.

An action of slander cannot be maintained by a lessee or renter of tolls, for words spoken of him in his character of contractor for tolls, after he has ceased to contract for renting the tolls respecting which the words are spoken. *Semble*, the renting of tolls is not a profession or trade.

CASE.—The declaration stated, that the plaintiff, heretofore and before the commencement of the suit, and before and at the time of the committing of the grievances by the defendant as thereinafter mentioned, was the lessee and renter of certain turnpike tolls, and, amongst others, of certain tolls arising and payable upon and in respect of a certain road, to wit, at Tewkesbury, in &c.; and he the plaintiff had always well and truly and punctually paid the rent of such tolls, and had never been a defaulter in payment of any such tolls, at Tewkesbury or elsewhere; and whereas also, at the time of the committing of the grievances by the defendant, &c., to wit, on &c., a public meeting was held by the trustees of certain turnpike roads, to wit, in the city of Worcester, for the purpose of letting by public auction, among others, the tolls arising and payable in and upon certain turnpike roads, called, to wit, the Powick and Malvern districts, at which said meeting the plaintiff then attended for the purpose of bidding at the said auction, in order that he, the plaintiff, might become the lessee and renter from the said trustees of the said last-mentioned tolls; yet the defendant, well knowing &c., but contriving &c. to injure the plaintiff in his credit and reputation, and to cause it to be suspected and believed by all his neighbours &c., that the plaintiff had been and was a defaulter as such lessee and renter of tolls as aforesaid, and to prevent the plaintiff from being received by such trustees as the renter or lessee of any of the said tolls so put up to auction as aforesaid, and thereby and otherwise to injure the plaintiff in his said business of renter and lessee of tolls, &c., heretofore, and before the commencement of this suit, to wit, on &c., at the said meeting so holden as aforesaid, he the defendant, in a certain discourse which he the defendant then had of and concerning the plaintiff, and of and con-

cerning him as such lessee and renter of tolls as aforesaid, falsely and maliciously spoke and published at such meeting, in the presence and hearing of divers and many persons, of and concerning the plaintiff, and of and concerning him as such lessee and renter of tolls as aforesaid, the false, scandalous, &c. words following, that is to say, "He (meaning the plaintiff) was wanted at Tewkesbury; he (meaning the plaintiff) was a defaulter there;" whereby and by means of the committing of which said several grievances, the plaintiff was not only greatly injured in his credit and reputation, but also thereby, and on no other account whatsoever, the said trustees wholly refused to receive any bidlings from the plaintiff at the said auction, for any of the said tolls so put up to auction as aforesaid, or to suffer or permit the plaintiff to bid at the said auction for the same, or to become or be the renter or lessee of any such tolls, as they otherwise might and would have done; and he the plaintiff was thereby hindered and prevented from becoming and being the renter and lessee of the said tolls arising and payable on the said roads so called, to wit, the Powick and Malvern districts, as he otherwise might and would have been; whereby he the plaintiff hath lost and been deprived of great gains and profits, amounting in the whole to a large sum of money, to wit, £200, which might and would have arisen and accrued to him therefrom; and the plaintiff, by means of the premises, hath been and is, as such renter and lessee of tolls as aforesaid, and otherwise, greatly injured and damnified, to the plaintiff's damage of £200.

Pleas, 1st, not guilty; 2nd, that the plaintiff was not the lessee or renter of the said turnpike tolls in the said declaration first mentioned, or any or either of them, or any part thereof respectively, in manner and form, &c.; 3rd, as to so much of the causes of action mentioned in the declaration as relate to or are connected with the plaintiff's attending the alleged public meeting alleged to have been held by the trustees of

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certain turnpike roads, to wit, in the city of Worcester, for the alleged purpose of letting by public auction, amongst others, the tolls arising and payable in and upon certain turnpike roads called the Powick and Malvern districts, for the purpose of bidding at the alleged auction, in order that he might become and be the lessee and renter from the said trustees of the said last-mentioned tolls, as above in that behalf mentioned, the defendant saith, that the plaintiff never attended that meeting for that or any other purpose, in manner and form, &c.; 4th, as to so much of the causes of action as relate to or are connected with the public meeting therein mentioned, the defendant saith that such public meeting never was held, in manner and form, &c.; 5th, as to so much of the causes of action in the declaration mentioned as relate to or are connected with the auction therein mentioned, defendant saith that there never was such auction as therein alleged, in manner and form, &c.—Issues thereon.

At the trial, before *Gaselee*, Serjt., at the last assizes for Worcestershire, the chairman of the meeting of trustees for the Powick and Malvern district of turnpike roads proved that the plaintiff bid for the tolls there, and that the witness did not reject or prevent his bidding, but said he would take care he should, by his sureties, be a responsible person. Neither the plaintiff nor the defendant was the highest bidder, or became the renter of the tolls. The words were proved as laid. The learned serjeant told the jury they must be satisfied that the words were spoken of the plaintiff as a renter of tolls arising on roads at Tewkesbury. Verdict for the plaintiff, damages, 40*s.*; leave being given to move to enter a verdict for the defendant on the first and second issues.

A rule having been obtained accordingly,

Gray (*Allen*, Serjt., with him) shewed cause.—The only question in this case is, whether the introductory averment

in the declaration was material. The plaintiff contends that it was not. The declaration certainly begins by stating that, at the time of committing the grievances, the plaintiff was lessee and renter of certain turnpike tolls, &c.; but the words spoken by the defendant imputed to the plaintiff that, when on a former occasion he was a renter of tolls on the Tewkesbury road, he was a defaulter, viz. had not paid his Tewkesbury rent. As the plaintiff here had previously procured his living by renting of tolls, the words must be taken as used with respect to that renting, as they would in case of a profession or trade; and though at the time when the slander was uttered he was not a lessee of tolls, still, as he was about to become a renter of others, and was accustomed to do so, and procured a livelihood thereby, the cases respecting slander of a man in his profession or trade apply: Vin. Abr., tit. "Actions for Words," (U. a) pl. 16, p. 474, *Tuthill* v. *Milton* (*a*). [*Parke*, B.—How does it appear that the plaintiff was going to become a renter of other tolls? *Tuthill* v. *Milton* goes on the presumption of the plaintiff's continuance in trade as a linendraper. A profession is a continuing thing, but contracting to become a lessee of tolls is not a profession, and the habit of taking tolls is nothing. Nor is a taking of tolls as lessee an office.]

Whitmore, in support of the rule.—These words were not actionable per se, without proof of special damage. The cases for slander of a man in his calling shew that that calling, whatever it might be, had continued, either actually or by intendment, to the time of the speaking of the words; *Moore* v. *Synne* (*b*), *Collis* v. *Malin* (*c*). The latter case is as follows:—"Action for words. Whereas the plaintiff had used, per magnum tempus, the trade of buying and

(*a*) Yelv. 158.

(*b*) 2 Roll. Rep. 84. Plaintiff declared that he had been an attorney for divers years now elapsed, and that defendant called him a forging knave.

(*c*) Cro. Car. 282.

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selling cattle, and divers times bought upon his credit, that defendant said of him, 'Thou art a bankrupt.' Defendant pleaded not guilty, and found against him; and because he did not say that he used the trade at the time of the speaking the words, but per magnum tempus usus fuit, which may be divers years before, and the action lies not unless at the time of speaking, therefore it was adjudged for the defendant." Here any person might bid at the auction, and if he bid highest, and found good security, would have become the lessee of the tolls.

PARKE, B.—I am of opinion that this case does not fall within that class of decisions referred to on behalf of the plaintiff, which relate to trades or professions within the legal acceptation of those terms, viz. as conditions which by law are presumed to continue and not to be altered. A farmer's occupation may be a business, in respect of his skill in cultivating land. In the case cited from Yelverton, it did not appear that the plaintiff had ceased to be of the trade of a linendraper, and the Court said they would intend that he continued to be so. Here the plaintiff was bound to prove that he exercised the so-called profession both before and at the time the words were spoken. But the jury have found that the plaintiff's profession, so called, did not continue at the time the words were spoken; that excludes all presumption on the subject; the defendant's act was nothing more than speaking of the plaintiff as a former contractor. If these words had been spoken of the plaintiff at the time when his contract for hiring the tolls existed, it is doubtful whether the action could have been maintained; I incline to think that it could not. The verdict must be entered on the second issue for the defendant; and as the plea of not guilty denies that the words were spoken in the sense laid in the declaration, of and concerning the plaintiff as lessee, and it is found that they were not spoken of him as an existing or continuing lessee, of tolls, the defendant is entitled to a verdict on that issue also.

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ALDERSON, B.—The effect of slanderous words spoken of a man in a trade is to render him less able to carry on that trade; but words spoken of a man's conduct as to a past contract do not affect or injure his future conduct of another.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

MOORE v. GUARDNER.

Feb. 10.

The plaintiff was in custody under an attachment from the Court of Chancery, for non-payment of costs to the plaintiff in a suit in equity, the defendant in this action. After the costs were paid, the solicitor of the plaintiff in equity (the now defendant) refused to give an order to the sheriff to discharge the plaintiff, saying, "let him go to the court to purge his contempt." The judge in equity discharged him on motion:—*Held*, that no action was maintainable for refusing to give the order to the sheriff, and thereby prolonging the plaintiff's imprisonment, except on proof of express malice.

CASE.—The declaration stated, that before the committing of the grievances thereinafter mentioned, to wit, on 30th May, 1844, in a certain cause then pending in the Court of Chancery, before &c., wherein the now defendant was plaintiff, and the now plaintiff and Sarah his wife, and W. H. C., H. F., and F. S., were defendants, by a certain decree then duly made according to the course and practice of the said Court, by the Vice-Chancellor Knight Bruce, in the said cause, it was ordered and decreed that the bill of the now defendant (the plaintiff in the said suit) should be and the same thereby was dismissed, with costs, as against the said H. F. and F. S., defendants in the said suit; and it was thereby referred to the taxing-master of the said Court in rotation, to tax such costs; and the said now plaintiff, by his counsel, consenting thereto, it was thereby further ordered, that the now defendant should pay to the said W. H. C., as defendant in the said suit, £17, for his agreed costs of such suit; and it was thereby also referred to the said taxing-master to tax the costs of the now defendant of the said suit up to that time, and that the now plaintiff should pay such costs when taxed, and should also pay to the now defendant what he the now defendant should pay for the said costs of the said H. F. and F. S., and the said sum of £17, when paid by the now defendant to the said W. H. C. as aforesaid. The declaration then stated,

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that the costs of the now defendant were taxed by the Master at 86*l.* 15*s.* 6*d.*, and the costs of H. F. and F. S., as defendants in the said suit, at 27*l.* 0*s.* 10*d.*, which said two last-mentioned sums, together with the said sum of £17, so as aforesaid decreed to be paid by the said now defendant to the said W. H. C., and by the said now plaintiff to the said now defendant, amounted to 130*l.* 16*s.* 4*d.*; and whereas also afterwards, and after the said several taxations of the said costs, to wit, on 12th April, 1845, the said now defendant, for obtaining and compelling payment to him by the now plaintiff of the said three several sums of 86*l.* 15*s.* 6*d.*, 27*l.* 0*s.* 10*d.*, and £17, so amounting together to the said sum of 130*l.* 16*s.* 4*d.*, as aforesaid, caused and procured to be issued out of the said Court of Chancery a certain writ of attachment, directed to the sheriff of W., whereby the said sheriff was commanded to attach the now plaintiff, so as to have him before our said lady the Queen, in her said Court of Chancery, on the 9th May, 1845, wheresoever the said Court should then be, to answer to our said lady the Queen, as well touching a certain contempt which the now plaintiff, as it was alleged, had committed against our said lady the Queen, as also such other matters as should be then and there laid to his charge, and further to perform and abide such order as the said Court of Chancery should make in that behalf; and the said now defendant then caused the said writ to be indorsed according to the practice of the said Court, in manner following; that is to say, for not paying the sum of 130*l.* 16*s.* 4*d.* costs to H. S. G. (meaning the now defendant), in a cause wherein the said H. S. G. is complainant, and the within-named D. Moore (meaning the now plaintiff) and others are defendants (meaning the said cause hereinbefore mentioned), and which said sum of 130*l.* 16*s.* 4*d.*, mentioned in the said indorsement, was and is the same sum of 130*l.* 16*s.* 4*d.* hereinbefore mentioned, being the amount of the said three

several sums hereinbefore in that behalf mentioned; and the said now defendant afterwards, to wit, on the said 12th April, caused the said writ, so indorsed as aforesaid, to be delivered to T. S. L., Esq., then being sheriff of and for the said county of W., to be executed in due form of law; and the said sheriff afterwards, to wit, on 4th May, 1845, in obedience to and by virtue of the said writ, in his bailiwick, took and arrested the said now plaintiff by his body, and conveyed him to the common gaol of and for the county of W., and there detained him in prison under the said writ; and the said now plaintiff in fact saith, that he so being in custody of the said sheriff, in the said prison, afterwards, to wit, on 4th May, 1846, caused to be paid to the now defendant the sum of £1491, in full satisfaction and discharge of, among other monies, the said sum of 130*l.* 16*s.* 4*d.*, the amount of the said three several sums of 86*l.* 15*s.* 6*d.*, 27*l.* 0*s.* 10*d.*, and £17, hereinbefore mentioned, and being the said sum so indorsed upon the said writ, and the costs and charges payable according to the course and practice of the said last-mentioned Court, of the said attachment, which said payment the said now defendant then accepted and received in such full satisfaction and discharge as aforesaid, and whereby the said sum so indorsed upon the said writ, and the said costs, charges, and expenses, were fully paid and satisfied; and the now plaintiff, by the said W. H. C., as his then attorney and agent, thereupon then and after such payment and acceptance as aforesaid, requested and demanded of the now defendant to instruct and inform the said sheriff that the said sum so indorsed upon the said writ, and the costs, charges, and expenses of the said attachment, were paid and satisfied, and to give the said sheriff authority to discharge the now plaintiff from his custody under the said writ, as it was then the duty of the said now defendant to do, and as the said now defendant by the course and practice of the said Court of Chancery then could and ought to have done; yet the now defendant wrongfully,

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wilfully, and maliciously contriving and intending to oppress the now plaintiff, and to cause and procure him to be longer imprisoned and detained in the said gaol under the said writ, then wilfully, injuriously, and maliciously, and without any reasonable or probable cause whatsoever, refused to, and did not nor would instruct or inform the said sheriff that the said sum so indorsed on the said writ, and the said costs, charges, and expenses, were paid and satisfied, and wilfully and maliciously refused to and did not nor would give authority to the said sheriff to release or discharge the said now plaintiff out of his custody, under the said writ; whereby and by reason of the said premises, and of the wrongful and malicious conduct of the defendant in that behalf, the now plaintiff was detained in custody, to wit, in the said gaol of W., under the said writ, by the said sheriff, for a long space of time, to wit, for the space of six days after the said payment, acceptance, and discharge of the said sum so indorsed on the said writ, and the said costs, charges, and expenses of the said attachment, and thereby suffered and was put to great trouble, inconvenience, and expense, and his health was greatly injured, and the plaintiff also was thereby greatly aggrieved in his credit, reputation, and circumstances, and was also, by means of the premises, forced and obliged to incur and become liable to pay divers monies, costs and charges, and expenses, amounting in the whole, to wit, to £50, in and about applying to the said Court of Chancery for his discharge from the said custody, and in and about the necessary retainer and employment of his solicitor for that purpose, and otherwise in relation thereto.

Pleas, 1st, not guilty; 2nd, that the plaintiff did not cause to be paid to the defendant the said sum in the declaration in that behalf mentioned, in such full satisfaction and discharge as therein is in that behalf alleged, in manner and form, &c.; 3rd, that the plaintiff did not request or demand of him the defendant to instruct and inform the

said sheriff, in manner and form, &c.; 4th, that it was not the duty of the defendant to instruct and inform the said sheriff or give him authority to discharge the plaintiff, in manner and form, &c.—Issues thereon.

At the trial, before *Gaselee*, Serjt., at the last assizes for Worcestershire, it appeared that the action was brought for imprisoning the present plaintiff from the 4th to the 9th of May, 1846, under the following circumstances:—The present plaintiff was imprisoned in Worcester gaol on 5th May, 1845, under an attachment issued out of Chancery, 12th April, 1845, for not paying 130*l.* 16*s.* 4*d.*, costs of a suit in which the present plaintiff was a defendant; and on the 4th of May, 1846, he paid £1491 mortgage money, due to the present defendant, with interest and costs, including the 130*l.* 16*s.* 4*d.* The present defendant's solicitors, Messrs. Tarleton & Newton, claimed also 77*l.* 6*s.* 3*d.* as extra costs, which was eventually paid by the present plaintiff on 4th May, 1846, under special protests in writing by himself and his solicitor, served on them on that day. At a subsequent interview on the same day, Mr. Capper, the attorney of the present plaintiff, asked Mr. Tarleton for an order to the sheriff to let the plaintiff out of custody. The present defendant, the plaintiff in the Chancery suit, was present, and Tarleton in his presence said, "No, let him go to the Court to purge his contempt." A notice of motion for the plaintiff's discharge from prison, without prejudice to his right of action for false imprisonment, and for taxation of the bill of Messrs. Tarleton & Newton for 77*l.* 6*s.* 3*d.*, was served on them on 5th May. At the hearing, on the 8th May, the Master stated the practice to be for the solicitor, not the party to a suit, to give the order for discharging the opposite party from custody for contempt. The Vice-Chancellor *Bruce* disregarded the distinction attempted, between contempt for non-payment of costs and actual contempt, and ordered the immediate release of the present plaintiff, directing the present defendant to pay the costs of the applica-

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tion, leaving the question on the 77*l.* 6*s.* 3*d.*, to be argued afterwards. The plaintiff was discharged on the 9th May. The extra costs incurred by him on account of this motion were shewn to be about £19.

For the plaintiff it was argued, that the attachment was in the nature of an execution at law, by capias ad satisfaciendum, to compel payment of the debt; *R.* v. *Stokes* (*a*), *Lewis* v. *Morland* (*b*), *Morris* v. *Hayward* (*c*), *In re Gompertz* (*d*); and that the cases in Chancery shewed that the acceptance of costs waives the contempt incurred previously by not paying them; *Haistwell* v. *Granger* (*e*), *Hoskins* v. *Lloyd* (*f*); and that the act of the defendant was malicious, if not in fact, yet in the sense of his not having any reasonable ground for doing it.

For the defendant it was answered, that the plaintiff was bound to shew that the refusal to give the order of discharge was malicious, and that there was no evidence of any wilful or malicious act by the defendant, or of any refusal by him to discharge the plaintiff. *Crosier* v. *Pilling* (*g*) was cited.

Gaselee, Serjt., left it to the jury to say, first, whether they were of opinion that malice, not implied by law, but in fact, had been proved against the defendant, who, being present at the time when his solicitor refused to give an order to discharge the present plaintiff, sat by and gave no authority on the subject. Secondly, supposing they should be of opinion that the defendant, by not having ordered his solicitor to give the order for discharge, was guilty of malice in fact, what damages the plaintiff was entitled to recover. The jury found that the defendant was not guilty of malice in fact, and assessed the damages at £24, if he was liable in

(*a*) Cowp. 130.
(*b*) 2 B. & Ald. 56, per *Bayley* and *Holroyd*, Js.
(*c*) 6 Taunt. 569.
(*d*) 6 Ad. & E. 559
(*e*) 1 Eq. Ca. Abr. 351; *Anon.*, 2 P. Wms. 481.
(*f*) 1 Sim. & Stu. 393.
(*g*) 4 B. & Cr. 26.

point of law. Verdict for plaintiff for £24, with leave to move to enter the verdict for the defendant.

Whateley having obtained a rule accordingly,

Phipson (*Talfourd*, Serjt., with him) now shewed cause. —The second and third pleas are disposed of by the evidence of Mr. Capper, that the demand of the discharge was made in the defendant's presence from his solicitor. The learned judge withdrew the question of legal malice from the consideration of the jury. It may be contended, if necessary, that the attachment was a civil process. It was shewn to be a common practice of the Court of Chancery, that the plaintiff's solicitor should sign the order for the defendant's discharge. [*Parke*, B.—The question is, whether, without proof of express malice, an action on the case lies for not conforming to the practice of the Court of Chancery.] Whether the present defendant's solicitor was or was not bound to sign the order of discharge, it was the defendant's duty to procure the plaintiff's release. Had the sheriff been sued for escape, no discharge from the solicitor of the plaintiff could be pleaded; *Savory* v. *Chapman* (*a*). This case is in effect similar to *Crosier* v. *Pilling* (*b*), where it was held that a plaintiff is bound to accept from a defendant in custody under a ca. sa. the debt and costs, when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody; and that an action on the case will lie against a plaintiff for having maliciously refused so to do; it being also there held, that the refusal to sign the discharge is sufficient primâ facie proof of malice, in the absence of circumstances to rebut such presumption. [*Parke*, B.—That case, and *Hounsfield* v. *Drury* (*c*), are much against your argument.] In the latter case the plaintiff's primâ facie evidence of malice was

(*a*) 11 Ad. & E. 829. (*b*) 4 B. & Cr. 26. (*c*) 11 Ad. & E. 98.

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answered by proving that he was an insolvent debtor, and that all his estate had, by an order of the Court, vested in the provisional assignee. The illegality of the defendant's act made it unnecessary to prove express malice, or malice in fact, against him, and left it incumbent on him to prove a lawful excuse.

PARKE, B.—In *Hounsfield* v. *Drury*, the declaration was for maliciously refusing to accept payment of debt and costs. That and the other cases shew that this action could not be maintained without express proof that the defendant's refusal to sign an order for the plaintiff's discharge proceeded from express malice. Mere inference of malice, or malice in law, would not suffice, and the jury have negatived express malice. Want of reasonable and probable cause for the defendant's act is averred; however, since the case of *De Medina* v. *Grove* (*a*), it is doubtful whether, if the plaintiff had succeeded on all the issues, the declaration would not have been bad on motion in arrest of judgment. A sheriff having the custody of a prisoner in contempt for disobedience to the decree of the Court of Chancery, is bound to keep him till the contempt is purged, but, by the practice of that Court, is not punished for liberating him, if the solicitors on both sides agree that after paying debt and costs he shall not be further kept in custody. No knowledge of that practice was brought home to the defendant or his solicitor.

ALDERSON, B.—To support this action, it was necessary to give affirmative proof of malice in fact. Here the jury negatived such malice.

ROLFE, B., and PLATT, B., concurred.

Rule absolute (*b*).

(*a*) 15 Law J., Q. B., 284.
(*b*) See *Codrington* v. *Lloyd*, 8 Ad. & E. 449; *Rundle* v. *Little*, 6 Q. B. 174.

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In 1839 A. died seised in fee of lands, of which his eldest son, B., was his tenant. On his death, B., supposing him to have died intestate, entered on the lands, claiming them as heir-at-law, and in 1830 mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time, an outstanding term of 500 years was by his direction assigned to a trustee for the mortgagee. In 1835 B. sold the estate to the defendant, who paid off the mortgage; the legal estate in fee and the equity in redemption were conveyed to the defendant, and the term was assigned to a trustee for him, to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee to whom the term was assigned in 1835.

Held, first, that B. had a sufficient estate to make him a good conusor of the fine; secondly, that, by the operation of the 8 & 9 Vict. c. 112, the term had absolutely determined, and the plaintiff could not recover upon the demise laid in the name of the trustee.

To prove the levying of a fine with proclamations in a court of great session in Wales, the chirograph was produced, having one proclamation indorsed, and the plea-roll of the same session at which the chirograph stated the fine to have been levied, containing an entry of a licentia concordandi between the same parties and respecting the same premises as those mentioned in the chirograph:—*Held* sufficient, by virtue of the stat. 5 Vict. c. 32, s. 2.

EJECTMENT to recover a messuage and lands in the parish of Llanycil, in the county of Merioneth. At the trial, before Lord *Denman*, C. J., at the last assizes for that county, the following facts appeared in evidence:—

Thomas Cadwalader died in the year 1829, seised in fee of the property in question, a farm called Cefn. It was admitted at the trial that, on his death, his eldest son, Cadwalader Thomas, who had for many years lived upon the farm as tenant to his father, entered into possession of it as his heir-at-law, it being supposed that he had died intestate. In 1830, Cadwalader Thomas mortgaged the estate, by indentures of lease and release, to one William Williams in fee, and at the court of great session for the county of Merioneth, holden in August 1830, levied a fine to confirm the mortgage. At the same time, an outstanding term of 500 years, which had been originally created in the year 1777, was assigned to a trustee for the mortgagee. In July 1835, the defendant purchased the farm from Cadwalader Thomas, and paid off the mortgage; and by indentures of lease and release, dated in October, 1835, and executed by Cadwalader Thomas and by the mortgagee, the legal estate and the equity of redemption were conveyed to the defendant in fee; and by indenture of assignment of the same date, the term of 500 years was assigned by the trustee of the mortgagee to a trustee named

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by the defendant, to attend the inheritance. In 1845, it was discovered that Thomas Cadwalader had, before his death, duly executed a will, whereby he devised the farm in question to his second son, William Thomas, one of the lessors of the plaintiff, in fee.

Shortly before the trial, the plaintiff, having obtained a judge's order for that purpose, added a demise in the name of the defendant's trustee, to whom the term was assigned in 1835 (who was since dead), and another in the name of his executrix.

The defendant relied on the fine as a bar to the claim of the lessor of the plaintiff, and, in order to prove it, put in evidence the chirograph, which was in the following terms:—

"Merioneth, to wit.—This is a final concord, made in the court of our sovereign lord the King, of his great session of the said county, held at Dolgelly, in the said county, before Jonathan Raine, Esq., justice of his Majesty's great sessions for the said county, and other faithful people of the said lord the King, then and there present, on Thursday, to wit, the 12th day of August, in the first year of the reign of our sovereign lord William the Fourth, now king of the united kingdom of Great Britain and Ireland, and so forth, between William Williams, gentleman, plaintiff, and Cadwalader Thomas, gentleman, and Margaret his wife, deforciants, of four messuages, four dwelling houses, &c., with the appurtenances, in the parish of Llanycil, in the said county; whereupon a writ of covenant hath been sued thereupon between them in the same court, that is to say, that the aforesaid Cadwalader and Margaret have acknowledged the tenements aforesaid, with the appurtenances, to be the right of the said William Williams, as those which the said William hath of the gift of the said Cadwalader and Margaret, and those they have remised and quit claimed from them the said Cadwalader and Margaret and their heirs, to the aforesaid William and his

heirs for ever; and moreover the said Cadwalader and Margaret have granted, for themselves and the heirs of the said Cadwalader, that they will warrant to the said William and his heirs the tenements, &c., aforesaid, against them the said Cadwalader and Margaret, and the heirs of the said Cadwalader, for ever; and for this acknowledgment, remission, quit-claim, warrant, fine, and concord, the said W. Williams hath given to the aforesaid Cadwalader Thomas and Margaret his wife 180 marks of silver.

"WYNN BELASYSE."

One proclamation only was indorsed, as follows:—

"Merioneth, to wit.—The first proclamation was made on Tuesday, in this same great session, and so forth.

"WYNN BELASYSE."

In order to prove the proclamations, the defendant then put in evidence the Merionethshire plea-roll of fines, headed as follows:—

"Merioneth, to wit, 2nd session, 1830.—Pleas at his Majesty's great session of the said county, held at Dolgelly, in the said county, before Jonathan Raine, Esq., justice of his Majesty's great session for the said county, on Thursday, to wit, the 12th day of August, in the first year of the reign of our sovereign lord William the Fourth, of the united kingdom of Great Britain and Ireland King, Defender of the Faith.

"WYNN BELASYSE."

This roll contained the following entry:—

"Merioneth, to wit.—William Williams, gentleman, giveth to our sovereign lord the King 6*s.* 8*d.*, for license to agree with Cadwalader Thomas, gentleman, and Margaret his wife, in a plea of covenant, of four messuages, four dwelling-houses, four cottages, four barns, four stables, four cow-houses, four outbuildings, four gardens, four or-

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chards, two hundred acres of land, two hundred acres of arable land, two hundred acres of meadow land, two hundred acres of pasture land, two hundred acres of wood and underwood, ten acres of land covered with water, one hundred acres of furze and heath, and common of pasture for all and all manner of cattle, and common of turbary, with the appurtenances, in the parish of Llanycil, in the said county; and he hath a chirograph, and so forth."

On behalf of the plaintiff it was objected, first, that the conusor, Cadwalader Thomas, had not a sufficient estate in the premises to enable him to levy a fine; secondly, that the fine was not well proved; and thirdly, that the plaintiff was, at all events, entitled to recover on the demise laid in the name of the personal representative of the trustee of the outstanding term. The Lord Chief Justice was of opinion, that the defects in the proceedings relative to the fine were cured by the stat. 5 Vict. c. 32, s. 2; that the entry of Cadwalader Thomas in the character of heir-at-law was sufficient to enable him to levy a valid fine of the premises; and that the outstanding term, being a satisfied term before 31st December, 1845, determined on that day by the operation of the stat. 8 & 9 Vict. c. 112, s. 1; and he directed the jury to find a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him.

In Michaelmas term, the *Attorney-General* accordingly moved for and obtained a rule nisi to enter a verdict for the plaintiff, on all the grounds of objection taken at the trial. In the present sittings (Feb. 10 and 11),

Martin, Townsend, and *W. Yardley* shewed cause.—First, the proof of the fine was sufficient. The fine itself was well proved by the chirograph; and it was sufficiently proved

to have been levied with proclamations, by the production of the plea-roll. This is a case expressly provided for by the stat. 5 Vict. c. 32, "for better recording fines and recoveries in Wales and Cheshire;" the second section of which enacts, "that where it shall be needful to prove that any fine, which appears to have been duly acknowledged, was levied with proclamations in any of the said courts, it shall be taken to have been so levied, and shall have all the force of a fine levied with proclamations, although no chirograph or foot of such fine be found indorsed with the proclamations, nor any entry of them or any of them appear on the record, if such fine were duly inrolled or entered on the plea-roll of the session in which it was levied, docketed in the docket-roll or docket-book of such session, so as to set forth the names of the parties, and the places in which the lands are situated of which such fine was levied." This statute in terms relieved the defendant from the necessity of giving any further proof of the proclamations than was furnished by the plea-roll of that session, which sufficiently specifies the names of the parties, and the place where the lands were situate.

Secondly, Cadwalader Thomas, the eldest son of the testator, had such an estate as enabled him to levy a valid fine. He entered, on the death of his father, as heir-at-law, and so as owner of the fee, and was in a position, by reason of that wrongful entry, to levy a fine: Shep. Touch. 29; *Davies*, dem., *Lowndes*, ten. (*a*); *Hulm* v. *Haylock* (*b*). In *Doe* d. *Burrell* v. *Perkins* (*c*), which may be referred to for the plaintiff, the case was merely that of a tenant wrongfully holding over after the expiration of his term, who was therefore merely tenant by sufferance, and had no sufficient estate of *freehold* to enable him to levy a fine.

Thirdly, the outstanding mortgage term, which, on the

(*a*) 6 Man. & G. 471. (*b*) Cro. Car. 200. (*c*) 3 M. & Selw. 271.

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purchase of the estate by the defendant in 1835, was assigned to a trustee to attend the inheritance, being a satisfied term of years, which by express declaration was, on the 31st December, 1845, attendant on the inheritance and reversion of this land, absolutely ceased and determined on that day, by force of the stat. 8 & 9 Vict. c. 112, and therefore could not be used against the defendant in this action. That statute, which is intituled "An Act to render the Assignment of satisfied Terms unnecessary," after reciting that "the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate," enacts, in the first section, "that every satisfied term of years which either by express declaration or by construction of law shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid, by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st day of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term." [*Parke*, B.—One of the evils intended to be remedied was, the necessity of a double investigation of the title of the estate, and also of the term.] Here the plaintiff has put upon the record a demise in the name of the defendant's own trustee, and says, that inasmuch as the legal interest is in him for the residue of the term, the plaintiff is entitled

recover upon that demise. But surely the term, if it ists at all, can only exist so far as it is available to pro- t the interests of the party for whose benefit it was igned to attend the inheritance, and cannot be set up ainst him by any person claiming adverse title to the eritance. [*Alderson*, B.—You say it may be used as a eld, but not as a sword.] Yes; it has ceased to exist, less the defendant, for whose benefit it was kept alive, quires its protection. This is the view which appears to taken of the act by Sir Edward Sugden (*a*). The de- ndant here has a good title without the aid of the term; therefore does not require its protection, and it has con- quently determined altogether.

Welsby and *E. Beavan*, contrà.—First, there was no suf- ient evidence of the fine. It is clear there was no suffi- nt proof of the proclamations, unless the defendant can l in aid the provisions of the 5 Vict. c. 32. But that tute applies only where the fine "appears to have been ly *acknowledged*," which is not the case here. A fine nsists of five parts: the original writ of covenant; the entia concordandi, or licence to agree; the concord itself hich is the essence of the fine); the note of the fine; d the foot or chirograph, which recites all the proceed- gs. 2 Bla. Com. 350, and App. No. iv.; 2 Cruise, Dig. . xxxv. c. 2, p. 71. Then the stat. 4 Hen. 7, c. 24, poses also the necessity of proclamations. Blackstone scribes the "concord or agreement itself" as being "an *knowledgment* from the deforciants that the lands in ques- n are the right of the complainant;" which acknow- lgment or recognition of right must be made openly court, or before commissioners authorised for that pur- se. And the stat. 5 Vict. c. 32, s. 1, requires all writs, ecords, and proceedings to be lodged at the proper offices.

(*a*) Vend. & P., 6th ed., Vol. 2, 651.

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Now here neither the original writ of covenant, nor the concord or acknowledgment, was produced, but only the licentia concordandi, given on payment of the king's silver. That is a proceeding antecedent to the concord or acknowledgment itself, and therefore cannot prove the fine to have been "duly acknowledged," in the terms of the 5 Vict. c. 32, s. 2. And when the statute proceeds to say that it shall have all the force of a fine levied with proclamations, though no chirograph be found indorsed with the proclamations, nor any entry of them appear on record, "if such fine were duly enrolled or entered on the plea-roll of the sessions in which it was levied," &c., the words "*such* fine," being read with the preceding part of the clause, must be taken to mean a fine "which appears to have been duly acknowledged." Further, the plea-roll is also insufficient, because it does not appear thereby that it is the plea-roll of the same sessions at which the fine was levied or acknowledged, which is expressly required by the statute.

Secondly, Cadwalader Thomas had not such a possession of the estate as owner, as to make him a good conusor of this fine. It appeared that he had lived on the farm for many years as his father's tenant; and for aught that was shewn, he might have been tenant when he levied the fine, for his tenancy might have continued after his father's death. If so, there was no such wrongful entry as to make him a disseisor: *Doe* d. *Burrell* v. *Perkins*. [*Townsend*.—It was admitted that on his father's death he *entered* as heir.] Supposing, then, that his tenancy ceased on his father's death, a mere wrongful *continuance* in possession, although claiming as heir, would not enable him to levy a fine: *Doe* d. *Davis* v. *Davis* (*a*); *Doe* v. *Perkins*. [*Parke*, B. —The authority of *Doe* v. *Perkins* is much shaken by the opinions of conveyancers, and the observations made on it in *Davies*, dem., *Lowndes*, ten.] It has been repeatedly

(*a*) 12 Price, 756.

recognized and confirmed: *Doe* d. *Souter* v. *Hull* (*a*); *Doe* d. *Parker* v. *Gregory* (*b*); *Doe* d. *Leeming* v. *Skirrow* (*c*). *Williams* v. *Thomas* (*d*) is an authority to the same effect. All these cases, and others, are fully discussed in the note to *Clerke* v. *Pywell*, in the last edition of Williams's Saunders (*e*), and the conclusion from them all is, that for this purpose there must be a wrongful *entry*, and that a wrongful *continuance in possession* is not sufficient. *Culley* v. *Doe* d. *Taylerson* (*f*) states the same doctrine. [*Parke*, B. —There must be an estate of freehold, by right or by wrong. But these parties did not go down to trial to dispute the estate of Cadwalader Thomas. Looking at the notes of the learned judge, we think the fact of the wrongful entry was admitted. The admission is not of a continuing possession, but of an entry as heir. We must take it that the conusor had a sufficient estate.]

Lastly, as to the outstanding term. If it is merged in the inheritance by the operation of the 8 & 9 Vict. c. 112, it can afford the defendant no protection at law; if it is not, the plaintiff is entitled at law to recover on the demise in the name of the termor. If it still subsists at all, as it was assigned by express declaration to attend the inheritance, the statute must be construed to mean that it is to subsist to protect the party entitled to the inheritance, in whomsoever the right may be shewn to be. [*Parke*, B.—No; it must surely mean that it is to subsist to protect the estate of the defendant, who was a purchaser for value without notice, and for whose benefit it was assigned.] No doubt, if the defendant could have set up the term, and there had been no demise in the termor's name, he might have had a good defence by means of the term. [The learned counsel here read some comments on this statute,

(*a*) 2 D. & R. 38.
(*b*) 2 Ad. & E. 14.
(*c*) 7 Ad. & E. 157.
(*d*) 12 East, 141.
(*e*) 1 Saund. 319 *c*.
(*f*) 11 Ad. & E. 1003.

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from a pamphlet by Joshua Williams, Esq., entitled "Remarks on the Acts of the Session 8 & 9 Vict." &c.] In the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, there is a somewhat similar provision, but there the clause is more accurately worded, and the term is expressly made to subsist as a protection in equity only. Here, by the express terms of the proviso, it is to afford to *every person* the same protection against (inter alia) "any action," that it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after 31st December, 1845, and is, for the purpose of *such* protection, to be considered in every court of *law* and of equity to be a subsisting term.

Parke, B.—With respect to the first point, as to the evidence of the fine, we think there was sufficient proof of a valid fine. The chirograph was the legal and indeed the best evidence of the fine, although it did not also prove it to have been levied with proclamations, which ordinarily ought to be proved by an examined copy of the roll. But as the officers of the Welsh Courts were in the habit of keeping the rolls very imperfectly, the stat. 5 Vict. c. 32 was passed to dispense with the necessity of strict proof of the proclamations, if the plea roll contain sufficient to identify the parties, and the premises mentioned in it, with those described in the chirograph. Here the chirograph proved that the fine was duly acknowledged, and shewed at what great session it was levied. Then the entry on the plea roll, which was of that same great session, sufficiently sets forth the parties and premises to identify the chirograph as referring to the same subject matter. We have already disposed of the point respecting the sufficiency of the conusor's estate. With respect to the only remaining point, relating to the operation of the Satisfied Terms Act, as there is another case standing for argument (*a*), in which

(*a*) *Doe* d. *Hall* v. *Moulsdale*, argued the same day; post.

a similar point arises, we will hear that before we finally decide.

Alderson, B., Rolfe, B., and Platt, B., concurred.

Cur. adv. vult.

The judgment, as to the last point, was now delivered by

Parke, B.—At the time this case was argued, we gave our opinion on two of the points made, and took time to consider the third. The defendant was purchaser of this property for valuable consideration, and took an assignment of an old satisfied mortgage term, from the trustee of a person who had taken a conveyance from an heir-at-law, who entered on the death of his ancestor, and levied a fine. We held that the fine was good, under the recent statute, 5 Vict. c. 32, s. 2, which was passed to remedy the negligence of the officers of the late Welsh Courts; and the heir-at-law having sufficient title to enable him to levy a fine, the present defendant is in by good title, and does not require the satisfied term to protect him in his possession. The question which remains to be decided is, what has become of the satisfied term under the 8 & 9 Vict. c. 112, which provides, that "every satisfied term of years which either by express declaration or by construction of law shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, as to the lands upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded him if it had continued to exist, but had not been assigned or dealt with after the 31st day of De-

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cember, 1845, and shall, for the purpose of such protection, be considered in every court of law or equity to be a subsisting term." As the plaintiff has in his declaration a demise by a trustee of the term, added to that of the real claimant of the property, we must decide whether that satisfied term did or did not continue after the 31st of December, 1845; and in order to do this, we must also determine whether the party claiming the protection of the term was really entitled to that protection against an incumbrance; and as that is a question of equity, we have thrown us the duty of a court of equity without adequate machinery. Such, however, is the operation of the act, and we must therefore decide whether the defendant, who was in possession, wanted the protection of this term. Now as we have already held that he did not, seeing that he had the legal estate wholly independent of the term, his case does not fall within the latter part of the first section of the statute; but it falls within the former part of it; the effect of which is, that the term actually ceased and determined by the operation of the act on the 31st of December, 1845, and consequently the plaintiff cannot recover on the demise of the trustee of the term. If it had turned out that the defendant wanted the protection of the term, on the ground that he was a purchaser for valuable consideration, it would be necessary for us to determine what course he ought to take; probably it would be necessary for him to apply to a court of equity, or to apply to this Court to strike out of the declaration the demise in the name of the trustee; but as he does not want the protection of the term, it has absolutely ceased and determined on the 31st of December, 1845. The defendant is therefore entitled to a verdict on all the demises, and this rule must be discharged.

Rule discharged.

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CASE against the sheriff of Yorkshire, for extortion. The declaration stated, in the usual form, that the plaintiff recovered judgment against one Beaumont for £600 debt, and 3*l.* 10*s.* damages; that he issued a fieri facias, directed to the sheriff of Yorkshire, indorsed to levy 304*l.* 10*s.*, and interest on 303*l.* 10*s.*, at 4 per cent. per annum, from the 5th day of February, 1842, till payment, besides sheriff's poundage, officers' fees, costs of levying, and all other incidental expenses; and that the writ was delivered to the defendant as sheriff of Yorkshire; by virtue of which said writ the defendant, so being such sheriff, seized and took in execution divers goods and chattels of the said Beaumont, and then levied a certain small amount thereupon and thereout, to wit, the amount of 28*l.* 10*s.* Yet the defendant, so being such sheriff, not regarding his duty as such sheriff, nor the statute in such case made and provided, and passed in the reign of her Majesty Queen Elizabeth, afterwards, to wit, on &c., by reason and colour of his office of sheriff of the said county of York, wrongfully, illegally, and oppressively had, received, and took of and from the now plaintiff, for the serving and executing the said execution, a large sum of money, to wit, £16, the same sum being a larger, more, and other consideration and recompence than in the same statute was and is limited and appointed in that behalf, of and for the said sum so levied as aforesaid; that is to say, a

The stat. 29 Eliz. c. 4, (against extortion by sheriffs, &c.), is not repealed by the 1 Vict. c. 55; but the only effect of the latter statute is to exempt from the penalties of the statute of Elizabeth the cases in which the sheriff shall take no larger fees than shall be allowed by order of the judges. Therefore, in a declaration on the case for extortion, on the statute of Elizabeth, it is not necessary to negative the defendant's having had authority under the statute of Victoria to take the fees complained of; but that is matter of defence, which should come by way of plea.

The Court would not take judicial notice that an order of the judges, allowing a scale of fees under the stat. 1 Vict. c. 55, was made before the time of the alleged extortion stated in the declaration.

The declaration stated that the defendant levied, out of goods of the plaintiff's debtor, a certain sum, to wit, 28*l.* 10*s.*; and that he wrongfully took from the plaintiff, for serving and executing the execution, a large sum, to wit, £16, the same being a larger sum &c. than by the statute limited, of and for the sum so levied, that is to say, a large sum, to wit, the sum of £15, more than in the said act limited in that behalf. *Semble*, that this allegation of the extortion was bad in point of form; for that the poundage allowed upon this levy by the statute being 1*l.* 8*s.*, the statement that the defendant took £16, and that that sum was excessive by £15, was repugnant; and if the words, "to wit, the sum of £15," were rejected as surplusage, there was no sufficient allegation of the damage.

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large sum, to wit, the sum of £15, more than in the said act is limited and appointed in that behalf. Whereby the plaintiff is damaged and aggrieved to the amount of the said sum of £15, contrary to the form of the said statute in such case made and provided.

Special demurrer, assigning for causes, amongst others, that the breach is too general, in this, to wit, that it does not appear how much the defendant took for poundage, and how much for possession money, and how much for incidental expenses; that the said breach leaves it uncertain what consideration and recompence ought to have been allowed to be taken by the defendant; that the defendant cannot take issue upon the first breach, without referring to a jury the determination of the question of law, whether the defendant had taken more than by law is allowed; nor does it appear how the sum of £1, admitted by the declaration to be payable to the defendant, is composed, or for what, besides poundage, the same is so payable; that the breach is repugnant, in this, that although it appears by the declaration that the defendant was, by the provisions of the statute passed in the reign of her late Majesty Queen Elizabeth, entitled to the sum of 1*l.* 8*s.*, the breach states or sets forth, by necessary implication, that the defendant was only entitled to receive £1; that it is not stated, nor does it appear with sufficient certainty, in or by the breach, or any part of the declaration, that the excess of money taken over and above the money allowed by the said statute passed in the reign of her late Majesty Queen Elizabeth, was taken as and by way of poundage only, or as and for such recompence and consideration only as is in and by the said last-mentioned statute allowed, and not in respect of other fees by him payable to the sheriff; that it is not stated that the said first breach was committed, or the writ in the declaration issued, before the passing of an act of Parliament made and passed in the first year of the reign of Her present Majesty, for better regulating the fees payable to sheriffs upon the

execution of civil process; that it appears that the said writ was issued, and the said money taken, after the passing of the said last-mentioned act of Parliament; that it is uncertain whether by the said breach it is intended to complain of extortion at common law, or of an offence in violation of the said statute passed in the reign of her Majesty Queen Elizabeth.—Joinder in demurrer.

The case was argued at the sittings after Trinity Term, 1846 (July 4), by

Rew, in support of the demurrer.—This declaration discloses no cause of action. Since the passing of the 1 Vict. c. 55, it cannot be contended that a sheriff is not entitled to take a larger fee than is allowed by the stat. 29 Eliz. c. 4: *Davies* v. *Griffiths* (*a*). The statute of Elizabeth, which is divisible, and consists of a *prohibitory* part and an *empowering* part, enacts, in the prohibitory part, that "it shall not be lawful, &c., to or for any sheriff, under-sheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, &c., by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, or goods of any person or persons whatsoever, more or other considerations or recompence than in this present act is and shall be limited and appointed, which shall be lawful to be had, received, and taken; that is to say, twelve pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds, and sixpence of and for every twenty shillings being over and above the said sum of one hundred pounds, that he or they shall so levy or extend and deliver in execution, or take the body in execution for, by virtue and force of any such extent or

(*a*) 4 M. & W. 377.

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execution whatsoever, upon pain and penalty that all and every sheriff, &c., which shall directly or indirectly do the contrary, shall lose and forfeit to the party grieved his treble damages." The prohibitory part of this statute is impliedly repealed by the stat. 1 Vict. c. 55, s. 2, which provides, that from and after the passing of that act, "*it shall be lawful* for sheriffs and their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster, charged with the duty of taxing costs in such Courts, under the sanction and authority of such Courts respectively." The statute of Elizabeth is general, and extends to all fees beyond the poundage: *Woodgate* v. *Knatchbull* (*a*), *Buckle* v. *Bewes* (*b*). If those cases had occurred since the statute of Victoria, the sums there claimed would have been allowed; it is evident, therefore, that the statute of Elizabeth is affected by the statute of Victoria. It will be said, however, that even if that is so, this matter should have come by way of answer from the defendant. But the statute of Victoria does not operate to create an exception out of the operation of the statute of Elizabeth, but, by implication, repeals the prohibitory part of that statute altogether; and the plaintiff ought, therefore, since the passing of the new act, to have shewn in his declaration that the defendant had no right under that act to the sum taken. It is a distinction established by many authorities, that where a subsequent statute or section merely creates an exception out of a previous enactment, the party must plead such exception; but where the subsequent statute or clause wholly alters and abrogates the previous enactment, the party who relies upon it must bring himself within it in its altered state, or within the new enactment. [On this point he referred to *Mayor of Salford* v. *Ackers* (*c*), *Thibault*

(*a*) 2 T. R. 157. (*b*) 2 B. & C. 688; 5 D. & R. 495. (*c*) Ante, p. 85.

v. *Gibson* (*a*), *Simpson* v. *Ready* (*b*), *Clayton* v. *Kynaston* (*c*), *Newys* v. *Larke* (*d*), *Usher* v. *Walters* (*e*), *Rex* v. *Trustees of Northleach and Witney Roads* (*f*), *Paget* v. *Foley* (*g*), *Snelgrove* v. *Smart* (*h*).] But even if the prohibition in the statute of Elizabeth is not repealed, but only modified, by the statute of Victoria, the objection still exists, for the offence of the sheriff, for which he is liable to treble damages, consists in his disobedience to *both* the statutes; it cannot be said that the damages arise more out of the one statute than the other; and as the qualifications of the latter act must be taken to be incorporated with the former, they should be avoided by the party relying on the former act.

Next, as to the special causes of demurrer. It is doubtful, on this declaration, whether the plaintiff proceeds for the penalty provided by the statute, the treble damages, or merely for damages at common law for the violation of the act. If the former, the amount of damage being then material, the declaration ought to shew what fees the defendant was entitled to under the statute. At all events, the amount of damage ought to be truly stated. Here the amount stated in the declaration is absurd; there is a plain inconsistency on the face of it, in the sum which the plaintiff alleges to have been taken. On the other hand, if the plaintiff is not going for the penalty, but merely for damages for the violation of the act, still the amount of the extortion is material in pleading. The plaintiff does not treat it as a penal statute, and therefore the defendant may be put to plead his justification specially; and he may wish to justify as to part of the amount under one head, and as to the rest under another. The extortion charged,

(*a*) 12 M. & W. 88.
(*b*) Id. 736.
(*c*) 2 Salk. 524.
(*d*) Plowd. 410.
(*e*) 4 Q. B. 553; 3 Gale & D. 594.
(*f*) 5 B. & Adol. 978.
(*g*) 2 Bing. N. C. 679; 2 Scott, 120.
(*h*) 12 M. & W. 135.

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therefore, must be divisible, and so the amount is material; and it makes no difference, for this purpose, that the sums are stated under a videlicet. In *Ashby* v. *Harris* (a), the Court appeared to think that the precise amount taken should be stated in the declaration, in order that the jury might find the fact of the taking, and the Court decide as to the excess. Here it would be impossible for the Court to do so, if the jury found the taking as alleged in this declaration. It may be said that here the Court can see that the defendant has taken *some* excess, though not the whole excess charged; but if so, the declaration is bad on special demurrer, as praying judgment of the whole: *Vigers* v. *Aldrich* (b).

Cowling, contrà.—This declaration is good in substance and in form. The first question is, whether the prohibition of the statute of Elizabeth is affected by the statute 1 Vict. c. 55. The statute of Elizabeth gives the right to *poundage*, apparently as a sort of *recompence* to the sheriff for the risk and expense in levying executions, which he must incur in all cases. It has no reference to collateral expenses, such as auction duty, possession money, &c. The reason of the enactment is given in the case of *Walden* v. *Veasely* (c), namely, that sheriffs were slow to execute writs, because at common law they had no fees. The words of the statute themselves shew the same thing, when they speak of "more or other *recompence* for the serving and executing of any extent or execution," &c. Under that act, therefore, the sheriff had no right whatever to any fees for collateral expenses, such as those incurred in keeping possession, in taking care of the goods, or in selling them. [*Parke*, B.—You say it applies to poundage only, as distinguished from fees.] Yes. The cases cited, of *Woodgate* v.

(a) 2 M. & W. 673. (b) 4 Burr. 2482.
(c) Noy, 75; Latch, 17.

Knatchbull and *Buckle* v. *Bewes*, clearly confirm this view. But, on the other hand, the statute of Victoria relates only to *fees*. It first recites and repeals certain acts specifically, but does not refer at all to the statute of Elizabeth; and its object clearly was to apply to what have been before termed *collateral* fees;—to leave the fees allowed by the former acts as they were, and then to give such additional fees as should be allowed by the officer of the Court, under the sanction of the judges. It was not intended to affect *poundage* at all. [*Parke*, B.—Clearly not.] How, then, does it affect the statute of Elizabeth? [*Parke*, B.—Because it authorises the sheriff to take more than the amount of the poundage given by the statute.] But not "for serving or executing the execution." The question in this case is, whether the defendant has or has not taken an excessive sum, under the statute of Elizabeth, for serving and executing the fi. fa. He does not claim to take the sum he has taken under the scale of fees made in pursuance of the 1 Vict. c. 55, but either by his authority under the statute of Elizabeth, or else by sheer extortion. The second section of the statute of Victoria ought to be read thus:—"Whereas by law certain recompence is given for serving and executing the execution, we give certain other fees for the additional duty beyond that." This view of the statute is taken by *Coleridge*, J., in *Curlewis* v. *Bird* (*a*). But, in truth, the point contended for on the other side does not arise. The statute of Victoria only says that it shall be lawful for the sheriff to take such fees, and no more, as shall from time to time be allowed by any taxing officer of the courts of law, under the sanction and authority of the judges of such courts. Now it is not shewn here that any scale of fees has been made under the statute of Victoria. If a higher scale of fees than that allowed by the former act has been made, that should have been pleaded; for the

(*a*) 1 Dowl. P. C., N. S., 752.

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Court cannot take judicial notice of it. A court of error could not, if the case were carried there.

With respect to the grounds of special demurrer, it is clear that an action *on the case*, as well as an action of *debt*, may be founded on the general prohibition in the 28 Eliz.; and in *Buckle* v. *Bewes* (*a*) and *Ashby* v. *Harris* (*b*) the declaration was in the same form as here. But it is said the statement, at the end of the declaration, of the amount extorted, is faulty; for that if the sum levied was only 28*l.* 10*s.*, and the sum taken is £16, the defendant cannot have taken £15 too much. In that respect the declaration was drawn in order to comply with the suggestion thrown out by the Court in *Ashby* v. *Harris*, that the amount actually taken ought to be stated. But it is laid under a videlicet, and the sum is not traversable, and immaterial. All the facts are stated which leave it a matter of mere computation. Either it is a mere inference of law, or a statement of fact for the jury. If it be wrong as an inference of law, the Court see it, and may reject it; if it be an allegation of fact, the Court cannot take judicial cognizance that it is wrong in fact, and so it is not matter for a special demurrer. [*Parke*, B.—If we reject the "to wit, £15," your declaration does not state the amount of the damages.] The plaintiff does not seek to recover treble damages, but merely goes for the violation of the statute. All the materials whereby the Court may see an excess taken, and how much, are previously stated, and therefore the actual quantum taken is unnecessary to be stated. The plaintiff may recover *nominal* damages.

Rew, in reply.—With respect to the last point, if the statement, that the defendant took more than allowed by law, be an inference of law, the Court will notice it, because the statement is inconsistent and repugnant.

(*a*) 3 B. & C. 688; 5 D. & R. 495. (*b*) 2 M. & W. 673.

The only difficulty as to the general question appears to be, whether the Court will take judicial notice of the order of the judges as to the scale of fees under the statute of Victoria. It is submitted that they will, inasmuch as it is an act of the Court, done under the authority of the statute: 1 Chit. Plead. 242, (7th ed.), and the cases there referred to. [*Parke*, B.—If the effect of the statute of Victoria is to take out of the operation of the statute of Elizabeth all the fees sanctioned by the former, is not that a matter of defence which should be pleaded, according to *Thibault* v. *Gibson* (*a*)?] That case is distinguishable; it was there evident that the 2 & 3 Vict. c. 37 merely created an exception out of the 12 Ann. st. 2, c. 16; but here the two enactments are inconsistent, and cannot stand together.

PARKE, B.—There appears to be an inconsistency in the mode in which the damage is alleged; the plaintiff cannot have sustained the £15 damage, if the defendant took only £16; and if the £15 be omitted, then it will be that the plaintiff has sustained damage, but without stating how much. However, as we should certainly give leave to amend in this respect, we may as well determine the other point.

Cur. adv. vult.

PARKE, B.—This case was argued before my brothers *Alderson*, *Rolfe*, *Platt*, and myself, at the sittings after Trinity Term, and a question of importance having been raised, it stood over for consideration. The declaration was framed upon the 29 Eliz. c. 4, and was for the recovery of treble damages against the sheriff of Yorkshire, for taking more than was allowed by that statute in executing a fieri facias. There was a special demurrer, assigning several causes, upon which the Court expressed its opinion

(*a*) 12 M. & W. 88.

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during the argument, and therefore it is unnecessary to repeat them. The substantial ground of objection to the right of action was, that the remedy given by the statute of Elizabeth is virtually repealed by the 1 Vict. c. 55; or if it still exists, that it could only be enforced for the receipt of more than was authorised by either statute, and that the declaration should have been framed on both acts, and have shewn that the receipt was a violation of both. After much consideration, we think that the objection ought not to prevail.

The statute of Elizabeth provides, that it shall not be lawful for any sheriff or under-sheriff, &c., or their officers, ministers, several bailiffs or deputies, by reason or colour of their office, to take of any person, directly or indirectly, for the serving or executing of any extent or execution, more or other recompence than by that act is limited and appointed, which is thereby made lawful to be had, received, and taken, viz. one shilling in the pound up to £100, and sixpence in the pound beyond that sum, upon pain that the officer offending shall pay treble damages to the party grieved, and forfeit forty pounds, half to the Crown and half to the informer.

The stat. 1 Vict. c. 55, was passed to increase and fix the remuneration to be paid to the sheriff or his officers, according to the discretion of the judges. It first recites the stats. 42 Edw. 3, c. 9, and 1 Hen. 5, c. 4, containing prohibitions to sheriffs, under-sheriffs, clerks, and bailiffs, continuing in office beyond certain times, and repeals those prohibitions. It then refers to the 23 Hen. 6, c. 9, which limited the fees to be taken to 20*d.* to the sheriff and 4*d.* to the bailiff, for an arrest or attachment, and 4*d.* to the sheriff for making a return, and repeals that portion of the statute, and then, by sect. 2, provides, that, from and after the passing of the act, *it should be lawful* for sheriffs or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees,

and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster, charged with the duty of taxing costs in such courts, under *the sanction and authority* of the judges of such courts respectively; and the third section gives a summary jurisdiction over such officers as shall extort, take, or receive any fee, gratuity, or reward not allowed as aforesaid.

This statute does not recite the 29 Eliz. c. 4, nor expressly repeal it, or any part of it. It leaves the sheriff's right to poundage untouched, as the Court has already decided in the case of *Davies* v. *Griffith*. But it is said that it impliedly repeals the statute of Elizabeth, and the clause inflicting a penalty. If the statute of Victoria had enacted that it should be lawful *in all cases* to take more for the future than the statute of Elizabeth allowed, no difficulty would have arisen in holding the statute of Elizabeth to have been thereby abrogated and rendered inoperative afterwards, upon the well-known principle, "leges posteriores priores contrarias abrogant." It would not be strictly correct to say that it was repealed, because a repeal has the effect of annulling the statute, as if it had never been made. But the statute of Victoria provides only that the sheriff, &c., shall take so much as shall be allowed to any officer, and with the sanction of the judges of the Court from which the process issues, and some difficulty arises as to the meaning of the second section. By the words of that section, it seems to have been contemplated that there should be a taxation in each case, before the claim by the sheriff or other officer should be lawful, and consequently that the third section, giving a remedy against officers, would apply only to cases where fees were demanded and received by them *after taxation*, which construction would render that section almost inoperative. Such can hardly have been the intention of the framers of that act; but if any doubt could be entertained in that respect, it is quite certain that the sanction of the judges of

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each court could not have been intended to have been required to each act of allowance by the officer, and the sanction meant by the act must have been by some general order or regulation of the judges, providing for a class of cases; and in that sense it has been understood by them. The effect, therefore, of the statute of Victoria is to legalise the receipt of fees beyond the poundage, *only* if the judges should make a regulation, and only in those cases in which the judges should by such regulation permit it; and it was by no means certain that any order would be made, or, if made, that it would apply to writs of execution.

The truth is, that the statute gives the power only to the judges of allowing, and thereby rendering lawful, an additional payment for executing a fi. fa.; but it does not absolutely legalise any. The judges might never exercise their power in any case, or, if they did, might not choose to make any additional allowance for process of execution. It is wholly contingent whether the statute of Elizabeth would be altered or abrogated in pursuance of the statute of Victoria or not; it depended wholly upon the exercise of the powers given to the judges. If the Court could take notice that the judges had exercised that power, as perhaps they ought, (for they are bound to take notice of the course of proceedings of all the superior courts), still we could not assume that such regulation had been made before the particular sum mentioned in the declaration was received, and consequently, for anything that appears, (whatever we suspect from the dates), the statute of Elizabeth was in force, and unaltered in any respect, at the time of the alleged offence, and therefore the declaration seems to us to be sufficient. If it had appeared by the declaration, or by plea simply stating the fact, that the receipt was since the date of the judges' regulations, it would raise a different question.

There is a further reason, for which we come to the same conclusion. If the statute of Victoria expressly enacted,

in positive terms, that in all cases in which the sheriff took no more than the additional sums which should be allowed or sanctioned by the judges, they should be exempt from the penalties of the statute of Elizabeth, there is no doubt that the declaration would have been good; and if the defendant was authorised by the regulation under the statute of Victoria, that regulation, and the acting in pursuance of it, must have come by way of defence from the defendant, and that upon the principle laid down in the note in 1 Wms. Saund. 262, and acted upon in the case of *Thibault* v. *Gibson*, as being an exemption contained in a subsequent act. The question then is, whether the enactment of the statute of Victoria is not in effect the same thing as a positive contingent exemption from the operation of the statute of Elizabeth, which still continues in force. We think that it is, and that the operation of the statute of Victoria is to constitute an exemption from the statute in those cases, in the same way as if it had been expressly enacted that such cases should be exempt from the operation of the statute of Elizabeth; and consequently that the declaration is sufficient on this ground, and that, therefore, our judgment must be for the plaintiff.

If the defendant will procure an affidavit that no more was taken than the scale of fees allowed, he may be let in to amend on the usual terms.

Judgment accordingly.

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IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer*).

Feb. 6.

CURLING *v.* WOOD.

Declaration in case stated, that the defendant was possessed of a wharf for the loading and unloading of vessels on the banks of the Thames, near which there was certain woodwork, before then placed by the defendant, and then being upon the bottom of the river, over which, at certain states of the tide, the vessel of the plaintiff thereinafter mentioned would float, but at others not; that, while the defendant was so possessed of the wharf, the plaintiff was possessed of a vessel then being, by the sufferance and permission of the defendant, at and alongside the said wharf, for reward to the defendant in that behalf; and the defendant then had the management and control of the said wharf, and the mooring and stationing of vessels at and near the same while they were at the said wharf, for the purpose of using the same. Breach, that the defendant unskilfully and negligently placed, moored, and stationed the plaintiff's vessel in the part of the river near the said wharf, and over the said woodwork, and unskilfully and negligently detained the vessel there for a long time, until, on the natural fall of the tide, she fell and lodged against the said woodwork, and was damaged thereby:—*Held*, on error, after verdict and judgment for the plaintiff, (upon a plea denying that the defendant had the management and control of the wharf, and the mooring and stationing of ships alongside it, &c., modo et formâ), that the declaration sufficiently stated a duty in the defendant safely to moor and station the plaintiff's vessel, and a breach of that duty.

CASE.—The declaration stated, that, before and at the time of the committing of the grievances, &c., the defendant below (the now plaintiff in error) was possessed of a certain wharf for the loading and unloading of ships and vessels, on the banks of the river Thames, near to which said wharf there then was certain woodwork, before then by the defendant placed and then being at and upon the bottom of the said river, over which said woodwork, at certain states of the tide of the said river, the ship or vessel of the plaintiff thereinafter mentioned would float, but at other states of the tide the said ship or vessel would not float, of all which premises the defendant, before and at, &c., had notice; that at the time of the committing of the said grievances, and while the defendant was so possessed of the said wharf as aforesaid, the plaintiff was possessed of a certain ship or vessel of great value, to wit, &c., then being by sufferance and permission of the defendant at and alongside the said wharf, for re-

ward to the defendant in that behalf, and the defendant then had the management and control of the said wharf, and the mooring and stationing of ships and vessels at and near the same, whilst such ships or vessels were at the said wharf for the purpose of using the same; yet the defendant, to wit, on &c., unskilfully, negligently, and improperly placed, moored and stationed the said ship or vessel of the plaintiff, in the part of the said river near the said wharf, and over the said woodwork, and unskilfully, negligently, and improperly detained the said ship or vessel there over the said woodwork for a long and improper time, and until the said ship or vessel, on the day and year aforesaid, upon the natural and usual fall of the tide in the said river, came, fell, and lodged upon and struck against the said woodwork, at the bottom of the said river, and there remained and continued upon and striking against the said woodwork for a long time, to wit, &c., and thereby then became and was greatly strained, bilged, broken, and injured, &c. &c.

The defendant below pleaded not guilty, and also a plea denying the allegation that he had the control of the wharf, and the mooring and stationing of the vessels, as alleged in the declaration; upon which issue, at the trial, the jury found a verdict for the plaintiff below. The Court of Exchequer having given judgment for him upon this verdict (*a*), a writ of error was brought upon that judgment, which was now argued (*b*) by

Cleasby, for the plaintiff in error (the defendant below). —This declaration discloses no duty for the breach of which the action can be maintained. The question which arises here is one of some importance to wharfingers and other occupiers of waterside premises. It is a new thing to charge a wharfinger in respect of an injury happening

(*a*) *Wood* v. *Curling*, 15 M. & W. 626.

(*b*) Before *Wilde*, C. J., *Coleridge*, J., *Wightman*, J., *Erle*, J., and *V. Williams*, J.

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to a ship in the river, when moored against his wharf. There is an understood distinction in this respect between wharfingers and dock-owners. The latter take the ship into their own premises, and are therefore responsible for injury to it there; but here the vessel was not taken into the custody or charge of the defendant below, but merely had her mooring ropes fixed to his premises. [*Wightman*, J.—The declaration states that the defendant had the management and control of the wharf, and the mooring and stationing of vessels near it while using the wharf.] It does not shew that there was any *employment* of the defendant to select the place for mooring, nor can it be intended that he undertook the selection of a proper place. [*Wilde*, C. J.—It is reasonable that the wharfinger should have the stationing of the vessels at his wharf; he knows the best order and rank in which to place them. The question is, whether the allegation that the defendant had the control of the wharf, and the mooring and stationing of the vessels, does not involve the responsibility of placing them in safe situations.] With respect to the woodwork, it must be taken that it was placed there rightfully, as it is not stated otherwise. A wharfinger is not entitled to wharfage merely for the unloading of goods into lighters out of vessels fastened to his wharf: *Stephen* v. *Coster* (*a*): the wharfage is for laying the goods upon the wharf. No employment for *reward*, therefore, is shewn here. The allegation that the defendant had the control of the wharf, which was his own, amounts to nothing; and the further allegation that he had the mooring and stationing of the vessels, means only that he had it *as wharfinger*, not by virtue of any separate office or duty. He has the mooring, because he has the wharf. But it is said the jury have found that the defendant had the stationing of the vessels at the wharf; but, reading the whole together, that means

(*a*) 3 Burr. 1408; 1 W. Bla. 413.

merely the making of them fast at his wharf. All is referable to his character of wharfinger, and does not involve any averment of an undertaking safely to moor and station, or of an employment to select a proper place for that purpose. It cannot be inferred, from anything that is here stated, that the plaintiff below parted with the control of his vessel. [*Wilde*, C. J.—The declaration alleges, and the verdict finds, that the defendant had the control of the mooring and stationing: that excludes everybody else. *Erle*, J.—And implies an undertaking to use ordinary care in doing it. *Williams*, J.—If the allegation is capable of two senses, it must be taken, after verdict, in the sense which will make the declaration good, not ill; and we must so construe it, if thereby we do no violence to the words.] With respect to the statement that the defendant negligently moored the ship, &c., that of itself is nothing, unless the relation of the parties raised a duty in him to use care: *Priestley* v. *Fowler* (*a*).

Martin, for the defendant in error, was not heard.

WILDE, C. J.—I entertain no doubt that this declaration is perfectly sufficient. What is it that is alleged as the foundation of the claim of indemnity against the wrong which the plaintiff has suffered? It is stated that the wharf was used by the defendant for profit—that the plaintiff's vessel was alongside it "for reward to the defendant." It may be that a wharfinger is not generally bound to moor the vessels alongside his wharf; different wharfingers may conduct their business differently; but they may gain a profit from the mooring. Here it is stated that the defendant had the management and control of the wharf, and the mooring and stationing of the vessels at or near it. What is the meaning of *having the*

(*a*) 3 M. & W. 1.

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stationing, but controlling the place where the ship is to be stationed? Then it is alleged that the defendant unskilfully, negligently, and improperly placed and stationed the vessel in a part of the river near the wharf, and over certain woodwork which had been placed there by the defendant, and negligently, unskilfully, and improperly detained the vessel over the said woodwork for an improper time, until the vessel, on the fall of the tide, struck upon the woodwork and was damaged. No complaint is made of his placing the woodwork there; that might be beneficial to others; but the effect of the whole statement in the declaration is, that, the defendant being the proprietor of this wharf, the plaintiff comes to use the wharf for profit to the defendant; and that he, who knows the condition of the wharf and of the woodwork, and has the control of the stationing of the vessel, negligently places her where she is greatly injured. Is not that a state of things which creates in the plaintiff a right to an indemnity for that injury? The declaration has not been demurred to: then, after verdict, how are we to construe it? Are we to look out for difficulties in the construction? It seems to me that we must do violence to the language, not to support the verdict. I think it is a good statement of such a relation between the parties as brought a responsibility on the defendant. It states that the defendant had the control, and chose to place and station the vessel in a place where she received injury. Wharfingers in general may not be bound to moor safely and securely. But in this case the defendant chooses to moor for profit, and in doing so he negligently and unskilfully does what causes the damage. It appears to me that that renders him responsible for that damage, and that the judgment of the Court below was therefore correct.

Judgment affirmed.

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LEDSAM and Others *v.* RUSSELL.

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A WRIT of error having been brought upon the judgment of the Court of Exchequer in this case (*a*), it was argued in this Court in Trinity Vacation, 1846 [June 19] (*b*), by

The *Solicitor-General* (Sir *F. Kelly*), for the plaintiffs in error (the defendants below).—First, the judgment for the plaintiffs below ought to be arrested, on the ground that, under the stat. 5 & 6 Will. 4, c. 83, s. 4, an extension of a patent cannot be granted by the Crown to any person but the original inventor. Secondly, the declaration is bad for not containing a sufficient averment of performance of the condition precedent contained in the letters patent, of securing to Whitehouse the annuity of £500. And, thirdly, the plaintiffs in error are entitled to judgment upon the seventh issue, on the ground that, under the second section of the above statute, the Crown has no power to grant new letters patent after the expiration of the term of the original patent.

I. The argument on the other side in the Court below upon this point was, that, inasmuch as the first section of the statute employs the words "any person who as grantee, *assignee*, or otherwise, has obtained or shall hereafter obtain letters patent for the sole making, exer-

Held, on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer:

1. That, under the stat. 5 & 6 Will. 4, c. 83, s. 4, an extension of a patent may be granted by the Crown to an assignee of the patent, as well as to the original patentee:

2. That the Crown may, under sect. 2, grant new letters patent after the expiration of the term of the original letters patent, if the petition for the same was presented before the expiration of that term.

Renewed letters patent were granted to B., on his securing to A., the original inventor, an annuity of £500 so long as the new letters patent should last; but if he could not secure such annuity, then, upon signification thereof by Her Majesty, &c., the new letters patent should cease. In an action by B. for an infringement of the patent, the declaration alleged, that, from the making of the said letters patent hitherto, the annuity had been duly secured to A., according to the true intent and meaning of the letters patent:—*Held* sufficient, after verdict.

(*a*) 14 M. & W. 574, where the pleadings are fully set forth.

(*b*) Before *Tindal*, C. J., *Patteson*, J., *Williams*, J., *Coltman*, J., *Maule*, J., *Wightman*, J., and *Cresswell*, J.

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cising, vending, or using of any invention," the words in sect. 4, "any person who now hath or shall hereafter obtain any letters patent *as aforesaid*," must also include an assignee of the patent. But such a construction is not necessary to the giving full effect to all these words, and, indeed, cannot be maintained without straining them beyond their natural meaning. "Letters patent *as aforesaid*" mean only "letters patent for the sole making, &c., of any invention." [*Tindal*, C. J.—The consequence of your reading of the statute would be, that if the patentee died, his executors could not obtain an extension of the time.] Perhaps, under an equitable construction of the statute, they might be let in, but certainly there are no words to give it them directly. No argument can be drawn against the plaintiffs in error from any other of the expressions used in this section. The words "prolongation," "extension," "new letters patent," are all used to denote the same thing. The words "*his* specification" and "*his* invention," cannot properly be applied to any other than the original patentee, who may have died, or assigned the patent, before the specification is enrolled, in which case there can be no enrolment. [*Coltman*, J.—The specification is part of the title of the assignee, and so is *his*. *Maule*, J.—Surely the word "his" must have a larger meaning than that of mere authorship. Would not the words "his invention" extend to a person who had an invention communicated to him by a foreigner, and for which a patent might be granted?] Such a person would be the "first and true inventor," within the meaning of the statute of James. The words "hath *obtained*," again, cannot properly apply to an assignee, but only to the original grantee who has obtained the letters patent from the Crown: *Spilsbury* v. *Clough* (*a*). [*Maule*, J.—Why may not the words apply to an assignment made before the act?

(*a*) 2 Q. B. 466; 2 G. & D. 17.

The power of disclaimer given by the first section may be as necessary for an assignee, in order to make the patent valid, as for the original grantee.] Whenever the legislature meant to include assignees, they are expressly named, as in sections 2 and 3. And, as *Coleridge*, J., observes in *Spilsbury* v. *Clough*, the words "assignee or otherwise," in the first section, may apply to the case of a foreign invention, of which a party in this country may become the assignee, and be the first to obtain a patent in this country for it. [*Maule*, J.—Such a person would be the *grantee*, and not the assignee, of the letters patent. I cannot help thinking that the Court of Queen's Bench, in *Spilsbury* v. *Clough*, forced the meaning of the word "assignee" in a way that cannot be sanctioned in a court of error.] There is a subsequent statute, 7 & 8 Vict. c. 69, s. 4, which expressly provides for an application by an assignee for a renewal of the patent; that affords a strong argument that the former act was not applicable, in this respect, to assignees. [*Patteson*, J.—The 7 & 8 Vict. c. 69, leaves the form of advertisement the same as before, so that there is just the same difficulty about its being *his* specification and *his* invention.]

II. There is no sufficient averment of performance of the condition precedent, to secure the annuity to Whitehouse. It is consistent with the allegation, that the security was given for an annuity continuing only from the date of the patent to the date of the declaration. [*Patteson*, J.—Even if that be so, a non-compliance with this condition does not render the letters void. The proviso is only that they shall cease upon signification or declaration by her Majesty that the annuity has not been secured.] In the former part of the declaration, it is expressly stated that the letters patent were *granted* upon this condition: that which follows is only by way of adding strength to the security; but the grant becomes ipso facto void, if the condition of it be not complied with.

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III. The issue on the seventh plea ought to be found for the defendant. If the Crown has power to grant new letters patent after the expiration of the old, there is no limit to the interval during which the invention may have become public, and many persons may have invested their capital in the manufacture of it. [*Cresswell, J.*—They have notice, by the advertisements, of the intention to petition for the renewal, and may come in and be heard against it.] Further, the *renewal* of the patent, after its expiration, cannot, with any regard to the meaning of words, be called an "extension" or "prolongation" of it. It is true the proviso states that "no such extension shall be granted, if the application *by petition* shall not be made and prosecuted with effect before the expiration of the term originally granted; and from this an argument may be drawn, that the *letters patent* may issue after its expiration: but the answer is, that the petition is not "prosecuted with effect" until the new letters patent are granted. In the case of a replevin-bond, the words "prosecuting with effect" mean prosecuting the suit with success: *Perreau* v. *Bevan* (a). The stat. 2 & 3 Vict. c. 67, which repeals this proviso, expressly distinguishes between an extension of the term of the letters patent, and a grant of new letters patent for the same invention.

Montague Smith, contrà.—First, the assignee of a patent is, equally with the original grantee, within the 4th section of the 5 & 6 Will. 4, c. 83, for he clearly is a person who "now hath" letters patent; that is, who has the letters patent themselves, and has the benefit of the property enjoyed under them. In this view of the clause, it is not necessary to read the words "as aforesaid" otherwise than has been contended for on the other side. The provision as to advertising is in favour of this construction; for it must refer to the person *then having* the letters patent, and carrying on the manufacture under them. It

(a) 5 B. & C. 284.

is then properly, and to all intents, *his* specification and *his* invention. Suppose a case where the original patentee, not carrying on the manufacture, resides at a distance from the assignee, who does carry it on; would it not be absurd to say that the advertisements should be published in the former place? Nay more, the consequence of the argument on the other side is, that the original patentee, by getting an extension, might turn the assignee, after the expiration of the original term, into an *infringer*. Again, that an assignee is within the terms of the statute appears clearly from section 1; for it cannot be contended that the original patentee, who has assigned all his interest, can then disclaim, and so deprive the assignee of the benefit of the patent; if that be so, then, if the assignee wished to amend by a disclaimer, the original patentee might refuse to do so, and so destroy all the benefit of the patent in the hands of his own assignee. That cannot be the object of the act. In the case of *Southworth's Patent* (*a*), which was an application by the assignees for an extension, Lord *Brougham*, in delivering the opinion of the Judicial Committee of the Privy Council, says—" The new letters patent must be, by the statute, granted to the party or parties who *have a legal interest in the letters patent now existing*. Of course the parties must take care that the right party or parties alone have the patent, otherwise it will have no legal effect:" and in that case the extension was accordingly granted to the persons who had an assignment by way of mortgage of the letters patent. *Wright's Patent* (*b*) was another case where the extension was granted to the assignees, as being the persons in whom the legal estate of the letters patent was vested at the time of the application. *Dowton's Patent* (*c*), again, was the case of an application by and grant to an *administratrix*; and there can be no distinction in this respect be-

(*a*) Webster's Patent Cases, 486. (*b*) Id. 561. (*c*) Id. 565.

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tween assignees in fact and in law. If the equity and justice of the matter is to be considered, the merit may be as great in the person who, having an assignment of the patent, brings the invention into real exercise, as in the original inventor. In section 2, where the power is confined to the inventor, he is styled the "*patentee*."

Secondly, with respect to the question arising on the seventh plea. It is sufficient if the petitioner has done all that he is required to do, in prosecuting his petition with effect; all that follows depends upon the discretion of the Crown, over which he has no control; and therefore the legislature has drawn the line at the point where the prosecution of the petition ceases. Here it is stated that the plaintiff below petitioned, and obtained a report of the privy council in his favour, before the expiration of the original term. The actual sealing and issuing of the letters patent may be delayed from various causes, quite beside the power of the petitioner. It is like the cases where judgment is given nunc pro tunc, when the delay has been the act of the Court, and not of the party. The 2 & 3 Vict. c. 67, shews what was meant by prosecuting with effect. [*Maule*, J.—Yes; the proviso seems to assume that prosecuting with effect is something prior to the grant itself.]—[As to the other point, he was stopped by the Court.]

The *Solicitor-General* was heard in reply.

Cur. adv. vult.

PATTESON, J.—This was an action brought by Russell (the plaintiff below) against Ledsam and others (the defendants below), for the infringement of a patent. That part of the declaration which is material to the present inquiry states, that one Cornelius Whitehouse obtained letters patent for an invention of certain improvements in manufacturing tubes for gas, which were dated on the 26th of February, 1825, and were granted for fourteen years;

that Whitehouse assigned the letters patent to the plaintiff; that the plaintiff, after the passing of the statute 5 & 6 Will. 4, c. 83, and before the expiration of the fourteen years granted by the letters patent, petitioned Her Majesty in council for a prolongation of his said term, having advertized in three London papers, and in the Wolverhampton Chronicle, being a country paper, published near to the town of Wednesbury, in the county of Stafford, where the plaintiff carried on the manufacture of the said invention: that the petition was referred to the Judicial Committee of the Privy Council, who reported to Her Majesty that a further extension of the term for six years should be granted: that by letters patent, dated the 26th of February, 1839, a further term of six years to be computed from the 26th of February, 1839, was granted, upon the plaintiff's securing to Whitehouse, the original inventor, an annuity of £500 so long as the new letters patent should last; but if he could not secure the annuity, then, upon signification thereof by Her Majesty under her signet or privy seal, or by six privy councillors under their hands, the new letters patent should cease. The declaration then states, that, from the making of the said letters patent thence hitherto, the said annuity of £500 has been duly secured to Whitehouse, according to the true intent and meaning of the said new letters patent. It then states that the defendants have infringed the letters patent. Several pleas were pleaded, but those which are material to the present inquiry are the seventh and ninth only.

The seventh plea alleges, that the said letters patent in the declaration secondly stated were granted after the expiration of the said term of fourteen years granted by the said letters patent in the declaration first mentioned, and not before the expiration of the said term.

The ninth plea alleges, that the annuity of £500 has not been duly secured to Whitehouse from the making of the said secondly mentioned letters patent, according to the

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true intent and meaning of the same. Issue was taken and joined on the seventh plea, and joined on the ninth. The jury found for the defendants as to the issue on the seventh plea, and for the plaintiff as to that on the ninth plea, and on all the other issues.

The Court below has given judgment for the plaintiff, notwithstanding the verdict for the defendants on the issue raised upon the seventh plea. Upon the argument in error, it is contended for the plaintiffs in error, not only that the seventh plea is a sufficient bar to the action, but objections are also taken to the declaration:—

First, that, under the statute 5 & 6 Will. 4, c. 83, an extension of the term of letters patent cannot be granted to the assignee, but only to the original patentee.

Secondly, that the securing of the annuity to Whitehouse is a condition precedent, the performance of which is not sufficiently shewn by the declaration, and the issue on the ninth plea is wholly immaterial. This last objection was rested on two grounds: first, that the averment in the declaration does not state that the annuity was granted after the new letters patent; and secondly, that it does not state that the annuity has been secured for the whole of the new term, but only "hitherto," that is, up to the commencement of the suit, or the date of the declaration.

The Court disposed of this objection on the argument, being clearly of opinion that it is not material whether the annuity were granted before or after the new letters patent; and secondly, that the annuity being secured from the making of the new letters patent up to the time of the infringement would be sufficient for the purposes of this action, even if the letters patent might be voidable afterwards; and supposing that the securing the annuity was a condition precedent at all. The averment is at all events good after verdict.

The question arising on the seventh plea depends on the true construction of the 4th section of 5 & 6 Will. 4, c. 83.

The plea does not state that the application by petition was not made and prosecuted with effect before the expiration of the term originally granted, which are the words of the proviso at the end of that section, but simply that the new letters patent were not granted before the expiration of the original term. The declaration states, that the petition was presented; that it was referred to the judicial committee; that the plaintiff was heard, and the report was made in his favour,—all before the expiration of the term; and that is not denied by the plea. The proviso, therefore, is complied with; and the only question is, whether the Crown has power to grant new letters patent after the expiration of the original term. The argument against such power is based on the use of the words "prolongation" and "extension" in that section, which are said to exclude any break or interval between the original and the new letters patent. The section enacts, that the party may apply for a "prolongation;" that the judicial committee may report for an "extension;" and that the Crown may grant "new letters patent," provided that no such "extension" shall be "granted" unless, &c. It is unfortunate that so much variation of language should be found in the section as to lead to difficulties and ingenious arguments; but we do not think that such variation, nor the use of such terms as "prolongation" and "extension," would alone be sufficient to warrant us in holding that everything must be done prior to the expiration of the original term, especially when we find a proviso added which does render it necessary that many, if not all other things, should be so done, but does not apply to the grant itself. But it is said that, if there may be an interval between the original and the new letters patent, great injustice may be done to those who have used or invested capital in preparing to use the invention during the interval. The true answer was given in the court below, viz. that, as to those who have used it in the interval, they are clearly not liable to an action;

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and as to those who have laid out their capital, they may be heard before the judicial committee, either to oppose any new grant altogether, or to be protected and indemnified for what they have lawfully done. Upon the whole, we are of opinion that the seventh plea is bad.

The remaining point is as to the validity of the grant of new letters patent to the assignee of the original letters. This also depends upon the true construction of the fourth section of the act.

The person who may apply is thus described: "If any person who now hath or shall hereafter obtain any letters patent as aforesaid," shall advertise, &c.

The words, "as aforesaid," refer to the first section of the act, which is as follows: "Any person who as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain, letters patent for the sole making, exercising, vending, or using of any invention," may &c. disclaim, &c.

On the one hand, it is argued that the words, "as aforesaid," refer to the person; on the other hand, that they refer to the thing. But we think the construction of the Court below, by which they have treated them as descriptive of the mode of having or obtaining, agrees best, both with strict propriety of language and the object and intention of the statute, and is therefore the true construction. Then they may be read, as regards the case before us, "if any person who now hath as assignee any letters patent," and will support the grant to the plaintiff as assignee. There is undoubtedly some difficulty from the use of the word "obtain," which seems more properly applicable to obtaining from the Crown, than to obtaining by assignment from any other person; and that appears to be the view taken by the judges of the Court of Queen's Bench in the case of *Spilsbury* v. *Clough* (a), in construing the first section

(a) 2 Q. B. 466.

of the act; and beyond all doubt that is the only sense in which the words "hath obtained" are used in the second section of the act. But in construing the fourth section, we are perhaps relieved from this difficulty; for the legislature, whether intentionally or not, has not added the word "obtained" after the word "hath," although it is added in the first and second sections; and therefore the words "now hath," in the fourth section, may, and perhaps grammatically must, be read in the sense of "now possesses."

We do not think that the use of the word "his," in the fourth section, coupled with the words "invention," "specification," "term," prevents this construction; for those things are his (the plaintiff's) in respect of his interest in them, though not in respect of his being the person to whom they originally belonged.

Upon the whole, therefore, we are of opinion that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

END OF HILARY VACATION.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EASTER TERM, 10 VICTORIÆ.

April 21.

BURNBY *v.* BOLLETT.

A., a farmer, bought, in the public market of a country town, from B., a butcher keeping a stall there, the carcase of a dead pig for consumption, and left it hanging up, intending to return after completing other business, and take it away. In his absence, C., a farmer, on seeing and wishing to buy it, was referred to A. as the owner, and subsequently, on the same day, bought it of A., the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out unsound and unfit for human consumption:—*Held*, that no warranty of soundness was implied by law between the farmers A. and C.

CASE.—The declaration stated, that the defendant, on &c., at Lincoln, publicly offered for sale the carcase of a pig for the food of man, and thereby then and there falsely and fraudulently undertook and warranted that the said carcase was in a sound and wholesome condition, and fit for human consumption, whereby the plaintiff was induced to buy the said carcase at the sum of 6*l.* 18*s.* 6*d.*, whereas, in truth and in fact, the said carcase was not in a sound and wholesome condition, and fit for human consumption, but, on the contrary thereof, was unsound, unwholesome, &c., whereby &c.

Plea, not guilty.

At the trial, before *Patteson*, J., at the last summer Assizes for Lincolnshire, it appeared that the plaintiff and the defendant were farmers. The defendant had bought

the carcase of the pig in question at the stall of one Penrose, a butcher, in the public shambles in Lincoln market; but, having other business in the town, left it hanging up at the seller's stall, till it was more convenient to take it away with him. Before he returned, the plaintiff came to the same stall, and seeing the pig, offered to buy it. The stall-keeper told him that it was the property of the defendant, who had bought it, but added that he might perhaps part with his bargain for a small profit. The plaintiff then went to seek out the defendant, and having met with him in the market, dealt with him for the pig, and bought it of him. It was forthwith conveyed to the plaintiff's house. Next day the meat was found to be diseased and quite rotten, so as to be wholly unfit for human food (*a*). Thereupon the plaintiff brought this action to recover back the purchase-money, by way of damages for the breach of an implied warranty of soundness. The defence was, caveat emptor. Upon these facts, *Patteson*, J., inclined to think that the law implied such a warranty on the part of the defendant as was alleged in the declaration, and directed the jury accordingly. Verdict for the plaintiff for 6*l.* 18*s.* 6*d.*, subject to a motion to enter a nonsuit. A rule nisi having been afterwards obtained accordingly,

Humfrey and *J. Hildyard* shewed cause at the sittings after Hilary Term.—The plaintiff was entitled to bring this action; for, on a sale of meat for the use of man, a warranty of soundness and fitness for human consumption is implied by law. [*Parke*, B.—The jury have negatived fraud. The question then is, whether any and every man who sells provisions in a market must be taken to sell them with an implied warranty of soundness.] It was immaterial whether the defendant knew it was un-

(*a*) It was sworn that, throughout the neighbourhood, the season had proved unaccountably injurious to meat.

said, that warranty of soundness by a seller of provisions was unnecessary, adding, that, if a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern-keeper. That case is thus stated in 1 Roll. Abr., tit. Action sur Case (P.), pl. 1 & 2—"If a taverner sells wine (knowing it to be corrupt) to another as sound, good, and not corrupt, without any express warranty, still an action of deceit lies against him, for there was a warranty in law. So, if I come into a tavern to eat, and the taverner gives and sells me 'bier et char corrupt, per que jeo suis mis en grand infirmitie,' an action lies against him without express warranty, for it is a warranty in law." It is again stated thus, by *Tanfield*, C. B., and *Altham*, B., in *Roswell* v. *Vaughan* (*a*):—"If a man sells victual which is corrupt, without warranty, an action lies, because it is against the

not stated that we warranted it to be good, and then it shall be adjudged the plaintiff's own folly. *Martin* (as it seems for plaintiff).—The warranty is not material (n'e. a purpos); for it is enacted (ordeine) that no one shall sell corrupt victual [see post, p. 648]. *Cottismore* (apparently a judge).—Ceo est actio popularis. *Babington* (apparently a judge).—The warranty, as *Martin* has said, is not material (n'e. pas a purpos); car si jeo vien en un taverne a manger, et il don' et vend' a moy bier ou char corrupt', par le quel jeo suis mis en grand infirmite, j'aurai action envers luy sur mon cas clerement, et uncore il ne fist garranty a moy. *Godred.*—It was lately adjudged in the King's Bench, that if a man sells a piece of woollen cloth, knowing it to be rotten and ill fulled, 'et ceo fuit adjudge bon sans garranty.' And then *West* said the wool was warranted, and so it was. *Rolf*, ridendo et protestando, that the plaintiff was a wine drawer, and yet knew nothing of wines, said for plea for B., that, at the time of selling the wine, it was sufficient and fit or sound (suffic' et able). The Court held that the plaint should be traversed; upon which he added, "and not corrupt." C.'s plea was, that he sold to plaintiff as B.'s servant, and in no other manner. *Martin.*—You have deceived the plaintiff to your own knowledge (de vre' conis' demen')". . . . .

(*a*) Cro. Jac. 196.

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commonwealth; as 9 H. 6. 53; 7 H. 4. 15 (*a*); and 11 Ed. 4. 6." The cases are collected in 1 Viner's Abridgment, 520. [*Parke*, B.—Suppose that I, not being a seller of wine, import a pipe from Oporto, and on its arrival at the docks transfer it to you for a price, without seeing or tasting it, shall I be liable to an action if it proves bad?] The sale alone would impose that liability. [*Alderson*, B.—There must be a difference between exposing food or wine for sale, and transferring a bargain in it. The case put in the Year Book of Hen. 6, is that of a general dealer, who as such may be bound at law to know the quality of the article he sells. *Parke*, B.—You must contend that even if the seller is not a dealer in provisions, or does not warrant them, or is not guilty of any fraud, or has no knowledge of the particular article, he is liable if it be not sound, whether the buyer suffers illness in consequence or not. The case in the Year Book, 9 Hen. 6, on which that in Keilway seems to rest, is one of a taverner. *Alderson*, B.—The Year Book, 11 Ed. 4, 6, lays down a general prohibition by law (*b*) to sell corrupt victual (*c*). Whether the bad wine or food is sold by a general dealer in either or not, the injury to the public from selling them is the same. *Rolfe*, B.—The case in Croke James explains

(*a*) This seems a mistaken reference to the Year Book.

(*b*) This seems to allude to Stat. Incert. Temp., c. 7, 1 Tomlins, Statutes at Large, 8vo, 388; see also the Statute of Pillory and Tumbrel, 51 Hen. 3, c. 6, s. 3.

(*c*) Year Book, Trin. 11 Ed. 4, 6 B. *Brian* said, "Car si jeo vende a un homme xx berbits per tuer, s'ils sonts corrupts, uncore si jeo garrante' eux, il n'avera acc' de disceit sur le garrantie, et ne sera travers, car q̃nt ils sont morts jeo ne puisse conustre q'ils sont corruptes, q̃nt jeo donc trust et confidence a vous, si jeo suis disceive, jeo aver' acc' de disceit, &c., mes si jeo vende mutton par manger quel est corrupt, il aver' acc' de disceit, comt. jeo ne garr' cell.'"

Nele.—"En vostre case le cause est 'p̄ c̄ q̄ il est prohibite per le ley q' home vende vitaile corrupted" &c. See 51 H. 3, c. 6, s. 3.

those in the Year Books, as turning on the scienter in the seller, or on the peculiar duty of a tavernor.] The scienter is immaterial. On the same grounds of public danger, a servant's carrying a child afflicted with the small-pox along a public highway in which persons are passing, and near inhabited houses, is indictable: *Rex* v. *Vantandillo* (*a*). Kitchen on Courts Leet, 21, pl. 29, shews that a selling by butchers, fishmongers, and other victuallers, of any corrupt victual, not wholesome for men's bodies, was inquirable in the leet. Blackstone, in his Commentaries, vol. 3, p. 166, says, "In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy (viz. by action on the case to exact damages for the deceit) lies against him." *Gray* v. *Cox* (*b*) shews that the seller of an article undertakes that it shall be reasonably fit for the use for which it is intended. [*Parke*, B.—That is confined to cases where he undertakes to manufacture it (*c*)]. Whatever a man does to the article to vary it from its natural state is sufficient, e. g. cutting up or skinning an animal. [*Parke*, B.—The sole point for consideration is, whether an ordinary individual, not clothed with any character of general dealer in provisions, who bonâ fide sells meat for human consumption, is liable to an action on the case by the buyer of the article if it proves unsound. This is not the case of a butcher, or tavernor, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound. Would an indictment lie against an ordinary individual for so doing?] On principle there is no distinction between such an individual and any such trader, and both ought to be alike liable; for the sale of unsound meat is in itself illegal.

(*a*) 4 M. & Sel. 73; 1 Russell on Crimes, by Greaves, 108.

(*b*) 4 B. & C. 108.

(*c*) See 2 M. & Gr. 279; 4 M. & W. 402; 2 B. & Adol. 456; 5 Bing. 533.

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Whitehurst and *Miller*, in support of the rule.—If a contract for sale of unsound meat is expressly forbidden by law, it is void, and no warranty can be implied by law to attach to it. Nor is there any distinct authority to prove what the plaintiff contends for; whereas it is clear law, that where a man buys a specific article, no warranty arises, for the maxim of caveat emptor applies: *Chanter* v. *Hopkins* (*a*). That applies to sales of food as well as of other chattels. If, on the contrary, a man orders an article to be made for a particular purpose, the party who undertakes to supply it is bound to furnish one fit for that purpose: *Shepherd* v. *Pybus* (*b*). In *Chanter* v. *Hopkins*, Lord *Abinger* said, "A warranty is an express or implied statement of something which the party undertakes shall be a part of a contract, and, though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstance of a party selling the thing by its proper description has been called a warranty, and the breach of such contract a breach of warranty; but it would be better to distinguish such cases, as a non-compliance with a contract which a party has engaged to fulfil." [*Parke*, B., referred to the note to *Cutter* v. *Powell* (*c*), in Smith's Leading Cases, Vol. 2.] *Parkinson* v. *Lee* (*d*) settles, that where a buyer has an opportunity of seeing part of the thing sold, no warranty is implied by law. Then do the old cases establish such a difference in the instance of selling unwholesome provisions for human food, that a party is liable to an action for selling them, without knowing them to be unfit for food, or warranting them to be fit? Is every isolated act of selling such a dealing as makes the seller liable in case of the article proving bad? The strongest case in the affirma-

(*a*) 4 M. & W. 399.
(*b*) 3 M. & Gr. 868; 4 Scott, 434. See *Brown* v. *Edgington*, 2 M. & Gr. 279.
(*c*) 6 T. R. 323.
(*d*) 2 East, 314.

tive is in the Year Book, 11 Ed. 4, 6 B. (*a*). It was one of the judges who there said that the sale of corrupt victual was prohibited by law. It was there said, that if I sell a man twenty sheep to kill (which must mean for food), if they are rotten no action lies, because till killed no one can tell whether they are rotten or not; nor would the man who sells to kill have them in his possession, so as to know their state when dead. It would then be sufficient in the declaration to state a sale of food not being fit for the food of man.] At the trial, the learned judge said there was a warranty in law, and left it to the jury only whether the pig was unwholesome when left at Penrose's stall, without asking them whether it was sold for use of man or not. [*Parke*, B.—It was assumed throughout that it was. The simple point is, whether the bare allegation that the defendant sold not exposed to sale to the plaintiff, for the food of man, corrupt and unsound victuals, he not being a dealer in them, or proved to know them to be unsound, is sufficient to entitle the plaintiff to maintain an action for deceit.] Comyns, in his Digest, tit. Action on the Case for Deceit (E. 4), cites Kitchen, 174, to shew that if a buyer of a horse has opportunity of discovering a (patent) defect in him by inspection, and does not, no action lies (*b*); adding, "So, if a man sell corrupted wine, if the vendee or his servant taste and approve of it." The case of a taverner is one where the article of food furnished to the guest is not selected by him in the first instance. So, if I order meat generally of a butcher, without selection, the implied contract is that the meat shall be good. [*Parke*, B.—That is not the case of ordering a particular piece of meat to be sent home. The question in the taverner's case is, whether as such he was bound to supply sufficiently good meat, resembling *Shepherd* v. *Pybus* (*c*). *Alderson*, B.—Fitz-

(*a*) Ante, p. 648, n. *c*. (*b*) See 2 Roll. R. 5; *Southern* v. *How*.
(*c*) 3 M. & Gr. 868; 4 Scott, 434.

PARKE, B., now delivered the judgment of the Court.—This case was tried before my Brother *Patteson*, at the last Summer Assizes for the county of Lincoln. It was an action on the case, alleging that the defendant publicly offered the carcase of a pig for sale, as and for food for man, and by falsely and fraudulently warranting it to be wholesome, and fit for food for man, sold it to the plaintiff, who paid the defendant the price.

It appeared on the trial, that the carcase of the pig was exposed for sale in the public street of Lincoln, in the shop of one Penrose, a butcher, when the defendant bought it, but did not take it away. The plaintiff afterwards applied to Penrose to purchase it, but being informed it was already sold to the defendant, he applied to him, and agreed with him to buy it, and paid him for it. It turned out that the pig was measly; it became afterwards putrid, was unfit for food, and the plaintiff, having called on the defendant to repay the sum given to him, which was refused, brought this action.

It did not appear that the defendant had any knowledge of the unsound state of the pig; and he was not a butcher, or dealer in meat. He had not exposed it publicly for sale. He had bought the pig for his own use, and left it till it should be delivered; but when he sold it to the plaintiff, there was a reasonable presumption for the consideration of the jury that he knew it was to be used for human food.

On this state of facts, Mr. *Whitehurst*, for the defendant, prayed for a nonsuit at the close of the plaintiff's case. The learned judge permitted the case to proceed, reserving the point, whether he ought to have nonsuited. The plaintiff had a verdict, and a rule nisi for a nonsuit having been obtained, the case was fully argued at the sittings after last term.

The argument for the plaintiff was, that the sale of vic-

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tuals to be used as food for man differed from the sale of other commodities, and that the vendor of such, if they were unwholesome, was liable to the vendee, without fraud or warranty. This position is laid down, apparently in general terms, in Keilway, 91; but the cases there referred to, in the Year Books, 9 Hen. 6, 37, pl. 53, and 11 Edw. 4, Trin. 10, pl. 6, and other authorities (*a*), when considered, lead to this conclusion, that there is no other difference between the sale of victuals for food, and other articles, than this, that victuallers, butchers, and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that, if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but *they* are also liable to punishment for selling corrupt victuals, by virtue of an ancient statute, (certainly if they do so *knowingly*, and probably if they do not), and are therefore responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit. That they, the common dealers, not *all persons*, are liable criminally for selling corrupt victuals, is clear; for Lord *Coke* says, in 4 Inst. 261:— "This court of the leet may inquire of corrupt victual, as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of the 9 Hen. 6, where Martyn saith that it is ordained that none should sell corrupt victual. And Cottismore held the opinion that it is actio popularis, whereupon it is collected that the conusance thereof belongeth to the leet; and Martyn and Neal, (11 Hen. 4), agreeing with him, said truly; for, by the statute of 51 Hen. 3, Stat. pillor', et tumbrel', et assiss' panis et cervis', and by the statute made in the reign of Edw. 1, intituled Stat. de

(*a*) 7 H. 4, 15, 16; 11 H. 4, 14, 15; 11 H. 6, 18.

pistoribus et brasiatoribus, et aliis vitellariis, it is ordained that none shall sell corrupt victuals."

The statute 51 Hen. 3, of the Pillory and Tumbril, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that seethe unwholsome flesh, &c. Lord *Coke* goes on to say, that Britton, who wrote after the statute 51 Hen. 3, and following the same, saith, "Puis soit inquise de ceux queux achatent per un manner de measure, et vendent per meinder measure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrieves (*macellarii*, butchers (*a*)), et les gents que de usage vendent a trespassants (passengers) mauvaise vians corrumpus et wacrus, et autrement perillous a la saunty de home, encountre le forme de nous statutes."

This view of the case explains what is said in the Year Book, 9 Hen. 6, 53, that "the warranty is not to the purpose; for it is *ordained* that none shall sell corrupt victuals;" and what is said by *Tanfield*, C. B., and *Altham*, B., Cro. Jac. 197, "that if a man sells corrupt victuals, without warranty, an action lies, because it is against *the commonwealth*:" and also explains the note of Lord *Hale*, in 1st Fitzherbert's Natura Brevium, 94, that there is diversity between selling corrupt wines *as merchandise*; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, *if it prejudice any*.

The defendant in this case was not dealing in the way of a common trade, and was not punishable in the leet

(*a*) *Macellarii*, rather sellers of meat in shambles; but "macegriefs," by Termes de la Ley, means those who sell wittingly stolen meat.

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for what he did. He merely transferred his bargain to plaintiff. He falls within the reason of the former pa Lord *Hale's* distinction; and there being no evidence warranty, or of any fraud, he is not liable. The plai ought, therefore, to have been nonsuited at the trial, this rule must be made absolute.

Rule absolut

April 28.

DOE *d.* KNIGHT *v.* CHAFFEY and Another.

In 1786 a testatrix devised her real estate to her brother-in-law T. K. and sister A. K. his wife, for their lives; and from and after their deceases, to her nephew J. G. K., son of the said T. and A. K., in fee; but in case the said J. G. K. should not survive the said T. and A. K., and should die without an heir lawfully begotten, then and in such case the testatrix devised the same *to the next heir* of the said T. and A. K., *their* heirs and assigns for ever.

THIS was an ejectment, brought on the demise of J Knight, dated 10th July, 1822, to recover "one undiv moiety, or half part, of and in" a farm and lands in parish of Martock, in the county of Somerset. At trial of the cause, before *Platt*, B., at the Summer Ass for that county, 1845, a verdict was found for the plai subject to the opinion of the Court on a case which st in substance as follows:—

The lessor of the plaintiff claims to be entitled under will of Elizabeth Goodden, hereinafter set out.

By indentures of lease and release, bearing date the and 16th days of May, 1758, the release being made tween Edward Damer and Mary his wife of the first Richard Maddock of the second part, Thomas Goo and Ann Damer, spinster, daughter of the said Ed Damer, of the third part, and Edward Patten and J than Warre, of the fourth part, certain tenements and (including the entirety of the lands, one undivided mo

The said J. G. K., mentioned in the will, died in his parents' lifetime, an infant. Aft death, another son of T. and A. K. was born, who was called by the same names. A died in 1795. The second J. G. K. married and had issue a son, J. K., and died in 1823. died in 1842.

Held, that the "next heir," in the will, was to be construed to mean the person who s fill the character of *true heir* of T. and A. K.; that, therefore, the executory devise over effect only on the death of T. K., the surviving devisee for life, and the estate then vest J. K., who then filled the character of heir of T. and A. K.

whereof is sought to be recovered in this action) were limited, after the solemnization of a then intended marriage, which afterwards took effect, between the said Thomas Goodden and Ann Damer, to the following uses, that is to say: To the use of the said Thomas Goodden, for his life, without impeachment of waste; remainder to the use of the said Edward Patten and Jonathan Warre, and their heirs, during the life of the said Thomas Goodden, in trust to support the contingent uses therein limited; remainder to the use of such child or children of the body of the said Thomas Goodden, on the body of the said Ann to be begotten, his, her, and their heirs, in such shares and proportions, and for such estates and interests, and charged with the payment of such sum or sums of money to any other the child or children of the said then intended marriage, and in such manner as the said Thomas Goodden and Ann his intended wife, or the survivor of them, should by any deed or deeds in writing, or by his or her last will and testament in writing, under the hands and seals of the survivor of them, attested by two or more credible witnesses, give, grant, limit, direct, or appoint; and in default of such gift, grant, limitation, direction, or appointment, and subject thereto, to various uses which did not take effect.

The said Thomas Goodden and Ann Damer were married on the 20th day of August, 1758. Thomas Goodden died before his wife, on the 12th day of October, 1779. There was issue of Thomas Goodden and Ann Damer five children. Of these children there were two only, viz. Ann and Elizabeth, who became material to the title: Ann was born on the 7th of September, 1762, was married to Thomas Knight on the 25th of November, 1783, and died 9th January, 1796; Elizabeth was born on the 27th of February, 1764, and died unmarried on the 24th of February, 1787.

The said Ann Goodden (formerly Ann Damer), after

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the death of Thomas Goodden, her husband, by an indenture of appointment, bearing date the 8th of March, 1784, and made between the said Ann Goodden of the one part, and the said Thomas Knight and Ann his wife (formerly the said Ann Goodden, spinster), and the said Elizabeth Goodden, of the other part, in pursuance of the power vested in her by the hereinbefore-mentioned indentures, duly limited and appointed the lands and tenements included in those indentures, from and after the death of the said Ann Goodden, to the use of the said Ann Knight and Elizabeth Goodden, in fee, as tenants in common.

The said Elizabeth Goodden died before her mother, on the 24th of February, 1787, seised, by virtue of the before-mentioned appointment, of the reversion in fee, expectant on the death of her mother, of and in one undivided moiety of the said tenements and lands mentioned in the above-mentioned indentures. The said Elizabeth Goodden, being so seised, made a will, dated the 11th of December, 1786, under which the lessor of the plaintiff now claims title. The material parts of this will, which was duly executed and attested to pass real estate, were as follows:—

"This is the last will and testament of me, Elizabeth Goodden, of Bower Hinton, in the parish of Martock, in the county of Somerset, spinster. I give and devise all and singular the messuages, tenements, lands, and hereditaments, which I am seised of or entitled unto, either in possession or reversion, remainder or expectancy, situate, lying, and being within the parish of Martock aforesaid, or elsewhere, in the said county of Somerset, unto my brother-in-law, and sister Ann Knight, his wife, of Bower Hinton aforesaid, yeoman, for and during the term of their natural lives; and from and after their deceases, I give and devise the same unto my nephew, John Goodden Knight, son of my said brother-in-law and sister Ann Knight, his heirs and assigns, for ever: But in case the said John Goodden

Knight should not survive my said brother-in-law and sister, Thomas and Ann Knight, and should die without an heir lawfully begotten, then and in such case I give and devise the same *to the next heir of* the said Thomas and Ann Knight, my brother-in-law and sister as aforesaid, their heirs and assigns, for ever. I also give and bequeath unto my said brother-in-law and sister Ann Knight, all such lands in Martock aforesaid as I am entitled unto for any term or number of years, to hold unto my said brother-in-law and sister Ann Knight, and their assigns, for and during the term of their natural lives; and from and after their deceases, I give and bequeath the same unto their said son John Goodden Knight, his executors, administrators, and assigns, and his heirs lawfully begotten. And as and for and concerning all and other my personal estate whatsoever, I give and bequeath the same unto my said brother-in-law and my sister Ann Knight, his wife aforesaid, whom I hereby make and appoint sole executor and executrix of this my last will and testament."

The said Ann Goodden, the mother of the testatrix, died in January 1796. John Goodden Knight, mentioned in the said will, died shortly after the testatrix, viz. in June, 1787, without issue; in fact, he was then a child not a year old. Soon after the death of this son, another son of the said Thomas and Ann Knight was born, who was also called John Goodden. This last John Goodden Knight was born in November, 1787; on the 3rd of November, 1811, he married Mary Welch; he died in June 1823. The lessor of the plaintiff is the eldest son of the marriage of the said last-mentioned John Goodden Knight and Mary his wife.

The said Thomas Knight, and Ann his wife, are both dead. The said Ann the wife died in December, 1795, and the said Thomas Knight died in June, 1842.

The case then set forth indentures of lease and release of

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the 1st and 2nd July, 1814, whereby Thomas Knight and the last-mentioned John Goodden Knight, the latter being stated therein to be entitled to the reversion in fee of the undivided moiety of the lands in question, under the will of Elizabeth Goodden, as surviving son and heir-at-law of Ann Knight, conveyed the undivided moiety in fee to parties under whom the defendants claimed title.

The case also stated various proceedings under an act of the 59 Geo. 3, for inclosing lands within the parishes of Martock and Muchelney, in the county of Somerset, which on behalf of the defendants it was contended had the effect of a partition and exchange, whereby the parties entitled to the entirety of the lands of Elizabeth Goodden would, after the award made under the act, be entitled to the entirety of the lands awarded, and not to an undivided moiety, and consequently that, even if the lessor of the plaintiff had a good title under the will of Elizabeth Goodden, such title would not support the demise in this ejectment. Upon this part of the case no report is called for.

The lessor of the plaintiff claims to be entitled to the undivided moiety sought to be recovered in this action, under the said will of the said Elizabeth Goodden, notwithstanding the said indentures of the 1st and 2nd July, 1814, and notwithstanding the said proceedings under the inclosure act. The defendants contend, that the lessor of the plaintiff is not entitled to recover under the said will, and that, even if he shews any title under the said will, he cannot, upon the facts disclosed in the case, maintain an action in the present form, for the undivided moiety of the said premises.

If the Court shall be of opinion that the plaintiff is entitled to recover, the verdict entered for him is to stand, otherwise the verdict is to be entered for the defendants.

The case was argued on the 25th and 27th of January last, by

Humphry, for the plaintiff.—The lessor of the plaintiff contends, that under the devise of the undivided moiety in question, contained in the will of Elizabeth Goodden, Thomas and Ann Knight took a joint estate tail, with a remainder in fee to the first John Goodden Knight, in case he survived them; or else that the lessor of the plaintiff is entitled under the executory devise over, as the *next heir* of Thomas and Ann Knight. If it were not for the introduction of the words "*their* heirs and assigns," in the executory devise, there would be no doubt in the case. The question is, whether the words "next heir" are words of limitation, enlarging the estate, or words of purchase, conferring the interest on the person who should first answer that description. Now in the construction of wills the Court will give effect, if possible, to the intention of the testator, and there may be in a will an intendment made which could not be in the case of a deed. And it is submitted that in this case the words "next heir of Thomas and Ann Knight," there being no subsequent words of limitation, created an estate tail in them, with an executory devise over in fee in failure of their issue. In *Nanfan* v. *Legh* (*a*), a devise to A. as soon as he should attain twenty-one, and to *his heirs lawfully begotten for ever*, was held to give A. an estate tail. So, in *Burley's case* (*b*), the devise was "to A. for life, remainder to the *next heir male*, then to remain;" and it was adjudged an estate tail in A. In *King* v. *Melling* (*c*), where the testator, having four sons, devised the land to his son B. for life, and after his decease to the issue of his body lawfully begotten on a second wife, and for want of such issue to J. M., in fee, Lord *Hale* held this to be an estate tail in B.; and cited *Bifield's case* (*d*), where a devise to A., and if he dies not having a son, then to remain to the heirs of the testator, was held an estate tail

(*a*) 7 Taunt. 85.
(*b*) Cited 1 Ventr. 230.
(*c*) 1 Rep. 66.
(*d*) 1 Ventr. 225.

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in A., the word "son" being taken to be nomen collectivum. On the other hand, in *Archer's case* (*a*), the limitation was to A. for life, and after, to the next heir male of A. and to the heirs of the body of such next heir male; and by reason of the superadded words of limitation, the devise to the heir was a remainder to him by purchase. But in a will, an "heir male," or "heir lawfully begotten," is by intendment taken to be an heir male, or lawfully begotten of the body of the party, and so to create an estate tail. Here, also, the "next heir of Thomas and Ann Knight" must be the heir of both husband and wife, and therefore must be the issue of their bodies: *Roe* v. *Quartley* (*b*). The testator seems to have entertained a preference for her nephew, and the descendants of her nephew; but she requires that the nephew shall survive his parents, the tenants for life, and leave issue, otherwise that the estate shall go to the next heir of the parents. How is it consistent with this general intention, that the words "next heir" should, as must be contended for the defendants, be words of purchase? whereas, if an estate tail vested in the parents on their death, failing John Goodden Knight, the estate tail goes in a course of succession through every issue of their body.

A second view of the construction of this will is, that, even if the words "next heir" be words of purchase, the plaintiff answers the description of such next heir. The word "next" or "nearest" makes no difference in the legal interpretation of the word "heir." *Heir* does not mean "son" or "child," unless such be the clear meaning of the testator. Here the manifest intention of the testator was, that the survivorship of the object of the devise should be essential to the character of devisee. If he took an estate tail, and died during the life of his parents, that estate would determine: *Brownsword* v. *Edwards* (*c*). The de-

(*a*) Cited 1 Ventr. 231. (*b*) 1 T. R. 630. (*c*) 2 Ves., sen., 243.

fendant's case here is, that "next heir" are words of purchase. But if so, the words, being technical, are to be construed technically, unless there be a violent necessity to the contrary: Jarman on Wills, Vol. 2, pp. 1—12. Now by the words "next heir" survivorship is implied; the person who answers the description must always be the eldest *surviving* child, or his representative. On this part of the case he cited *Archer's case*, *Willis* v. *Hiscox* (*a*), *Attorney-General* v. *Martin* (*b*), *Jesson* v. *Doe* (*c*), Jarman on Wills, Vol. 2, p. 232. [The learned counsel then proceeded to argue on the effect of the proceedings under the inclosure act.]

Malins, for the defendants.—The construction of this will is clear. The estate is given to Thomas and Ann Knight for life, and to their infant son John Goodden Knight and his heirs for ever. This expressly gives him the fee-simple. Then in what event is that fee taken away? It is in the event of his not surviving his parents, and leaving an heir lawfully begotten. *Nanfan* v. *Legh* shews that this means a lineal heir. Then comes the clause, the effect of which is the question for the Court, namely, the gift over to "the next heir of Thomas and Ann Knight, their heirs and assigns, for ever." The estate in fee is to go over when the two circumstances concur, of John Goodden Knight not surviving his parents, and not leaving lineal issue. These circumstances did concur; therefore the gift over took effect, and by way of executory devise: *Pells* v. *Brown* (*d*), *Doe* d. *Barnefield* v. *Wetton* (*e*). The estate in the first taker being a fee, with an executory devise over in case of a compound event, that is inconsistent with an estate tail: *Toovey* v. *Bassett* (*f*), *Frogmorton*

(*a*) 4 Myl. & C. 197.
(*b*) 2 Phillips, 64.
(*c*) 2 Bligh, 1.
(*d*) Cro. Jac. 590; Palm. 137; Godb. 282.
(*e*) 2 Bos. & P. 324.
(*f*) 10 East, 460

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v. *Holyday* (*a*). Then to whom did the estate go over? After the death of John Goodden Knight without issue in his parent's lifetime, it went to their next heirs and assigns for ever. The testatrix clearly meant, by "next heir," "heir apparent," in its ordinary sense. Having given the estate to the only living child of her sister and brother-in-law, then, if that child should die in their lifetime without leaving issue, she gives it to the person who should next sustain that character of *heir apparent*. "Next heir" in truth means *next child*, or at all events *next son*,—the person who would next be heir, if the parents were dead. There are many cases of such a construction in the case of wills. [He cited *James* v. *Richardson* (*b*), *Burchett* v. *Durdant* (*c*), *Beaulieu* v. *Earl of Cardigan* (*d*), *Darbison* d. *Long* v. *Beaumont* (*e*), *Goodright* v. *White* (*f*), *Carne* v. *Roach* (*g*), *Chambers* v. *Taylor* (*h*), *Wright* v. *Craven* (*i*), Fearne, Cont. Rem. 210, Jarman on Wills, Vol. 2, p. 13.] The case of *Roe* v. *Quartley*, cited on the other side, also supports the same construction. Now the lessor of the plaintiff is not the "next heir" in this sense; he is the grandson of the tenants for life, and the first person answering the description of heir on the death of the survivor of them, but he is not the heir contemplated by the testatrix.

The case was, at this stage, adjourned until the next paper-day (Jan. 29); and then, upon its being called on,

Parke, B., said,—We are all agreed as to that part of the case which relates to the construction of the will, namely, that the "next heir" means the person who should fill the character of *true heir* of Thomas and Ann Knight; and

(*a*) 3 Burr. 1618.
(*b*) T. Jones, 99; 1 Ventr. 334; 2 Lev. 232.
(*c*) 2 Ventr. 311; Carth. 154.
(*d*) Ambl. 533.
(*e*) 1 P. Wms. 229.
(*f*) 2 W. Bla. 1010.
(*g*) 7 Bing. 226.
(*h*) 2 Myl. & Cr. 376.
(*i*) 5 B. & C. 366.

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therefore that the executory devise over took effect only on the death of Thomas Knight, the surviving devisee for life, when the estate vested in the lessor of the plaintiff, who then filled the character of heir of Thomas and Ann Knight. With respect to the rest of the case, it is very desirable that it should be inquired into out of Court.

The case accordingly stood over for that purpose, but no agreement having been come to between the parties, the argument for the defendants now proceeded as to the other part of the case, and the Court gave

Judgment for the plaintiff.

TAYLOR, Administratrix of BARBARA TAYLOR, deceased, v. STEELE.

April 21.

ASSUMPSIT for money lent, interest, and money due on an account stated.

Pleas, non assumpsit, and the Statute of Limitations.

At the trial, before *Alderson*, B., at the last Northumberland assizes, it appeared that the action was brought by the plaintiff as administratrix of Barbara Taylor, to recover £170 for money lent by Barbara Taylor to the defendant, with interest thereon. On behalf of the plaintiff a witness was called, who stated, that in July 1839 he went to the defendant's house; the sheriff's officers were in possession of the defendant's goods. The defendant wished witness to lend him some money; witness said he could not. He saw the defendant again in the evening, when he said his sister (the deceased) had advanced him the money: it was between £150 and £180. The plaintiff tendered in evidence the following document, stamped with a 2*s*. receipt stamp:—

In an action for money lent, &c., the following document was tendered in evidence:— "Berwick, 16th March, 1841. £170. Received from Mrs. B. Taylor the sum of £170 for value received, for which I promise to pay her at the rate of £5 per cent. from the above date. A. N. Steele":— *Held*, not to require a stamp, either as a receipt, a promissory note, or an agreement of the value of £20.

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"Berwick, 16th March, 1841.

"£170.

"Received from Mrs. Barbara Taylor the sum of £170, for value received, for which I promise to pay her at the rate of £5 per cent. from the above date.

"A. N. STEELE."

On the part of the defendant, it was objected that the above document was inadmissible in evidence for want of a stamp, since it was either a receipt, a promissory note, or an agreement, in neither of which cases it was properly stamped. The learned judge overruled the objection, and the plaintiff had a verdict, leave being reserved for the defendant to move to enter a verdict for him.

Manisty now moved accordingly.—If this document was a receipt, it should have borne a 2*s.* 6*d.* stamp, but it cannot be a receipt, as it was not given at the time the money was lent. It is submitted that it is a promissory note. No particular form of words is necessary to constitute a promissory note. In *Green* v. *Davies* (*a*), an instrument in the following form—"Received of A. B. £100, which I promise to pay on demand, with lawful interest," was held a promissory note. So, where the instrument was thus—"John Mason, 14th February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash, as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother. £14." *Ellis* v. *Mason* (*b*). So, also, where the instrument was in the following form:—"August 25, 1837. Memorandum that S. B. Payne had 5*l.* 5*s.* for one month, of my mother and Shrivell, from this date, to be paid by me to her, B. Payne." *Shrivell* v. *Payne* (*c*). [*Parke*, B.—The more recent cases

(*a*) 4 B. & C. 235. (*b*) 7 Dowl. P. C. 598.
(*c*) 8 Dowl. P. C. 441.

say that implication is not enough, but there must be a positive engagement to pay.] If the present document be not a promissory note, it is an agreement of the value of £20, and should have been stamped accordingly. The case of *Melanotte* v. *Teasdale* (*a*) will perhaps be relied on as an authority to the contrary. There the document was thus:—"1839, November 11, I. O. U. forty-five pounds, thirteen shillings, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid, R. Teasdale," and that was held not to require a stamp. That case, however, is distinguishable from the present, for there the agreement was not necessarily of the value of £20; here the sum claimed as interest exceeds £20. In *Shepherd* v. *Wheble* (*b*), Lord *Abinger* ruled that an agreement to indemnify a sheriff, who had levied on goods worth £14, required a stamp, as there was nothing to limit it to any sum under £20. [*Parke*, B.—That case is overruled by *Cox* v. *Bailey* (*c*). *Alderson*, B.—I do not understand the principle of *Shepherd* v. *Wheble*. If that case be law, the verdict of a jury might make a stamp necessary when it was not necessary before. How can the necessity for a stamp be regulated by the possible event of the cause? It must appear that the agreement was of the value of £20 at the time it was made, otherwise it would be in the plaintiff's power, by limiting his claim, to make a document receivable in evidence when it was in fact inadmissible.] *Cox* v. *Bailey* is at variance with *Wrigley* v. *Smith* (*d*). [*Parke*, B.—In that case the party was liable to pay the whole debt, which exceeded £20.]

POLLOCK, C. B.—There ought to be no rule. The instrument in question is not a receipt, for it was not given at the time the money was lent. It was proved that a sum

(*a*) 13 M. & W. 216.
(*b*) 8 C. & P. 534.
(*c*) 6 M. & G. 195.
(*d*) 5 B. & Adol. 1117.

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between £150 and £180 was lent in the year 1839, and the document signed in 1841 shews it to have been £170. This is not a promissory note, for there is no promise to pay the principal sum, but only interest upon it. Then, with respect to its being an agreement, the party does not agree to pay interest to the amount of £20. The case of *Melanotte* v. *Teasdale* is decisive on that point. It was urged, that it might by subsequent events become of the value of £20; but even in that case, I doubt very much whether it would require a stamp. But in truth this agreement is not used for the purpose of enforcing payment of the money, but for the collateral purpose of shewing the rate of interest, and we are relieved from all difficulty by the statute 9 Geo. 4, c. 14, using the word "acknowledgment" as well as promise. This document, being an "acknowledgment," from which the law implies a promise to pay, is sufficient to take the case out of the statute, and does not require a stamp.

PARKE, B.—I am of the same opinion. This document is not a receipt, because it was not given at the time the money was lent. It is not a promissory note, because it contains no promise to pay the principal, but only the interest. Besides, a promissory note cannot be made for payment of an indefinite sum. I agree that an actual promise is not necessary, if there are words in the instrument from which a promise to pay can be collected. Then, as to its being an agreement, it is not of the value of £20. According to the more recent decisions, it must appear on the face of the instrument, or with reference to the subject matter be capable of being ascertained, that the agreement was of the value of £20 at the time it was entered into. Applying that rule to the present case, it is impossible to say that this instrument was an agreement of the value of £20 at the time it was signed, for the interest might never have amounted to £20. It is clearly an acknowledgment in

writing of a pre-existing debt, and an agreement to pay interest on it, from which we may infer a promise sufficient to take the case out of the statute.

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ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

CHRISTIE and Another, Assignees of YELD and DAWES, Bankrupts, *v.* BELL and Another, Public Officers, &c.

April 21.

In an action by the assignees of a bankrupt against the public officers of a banking company, to recover money alleged to have been received from the bankrupts in the year 1840, the Court, in order to save the Statute of Limitations, allowed the writ of summons to be amended, by stating the character of the plaintiffs and defendants.

THIS was an action by the assignees of bankrupts, to recover from "The National and Provincial Bank of England Banking Company" the sum of £2250, alleged to have been received under an execution, levied by them on the bankrupts in the year 1840. The writ of summons was directed to "Robert Bell and Edward Stewart," and required them (in the usual form) to enter an appearance at the suit of "James Christie and Joseph Adnit the younger, in an action on promises," (not stating the character of either plaintiffs or defendants). A declaration was delivered, in which the plaintiffs described themselves as the assignees of Yeld and Dawes, bankrupts; and the defendants were therein described as two of the registered public officers of "The National and Provincial Bank of England Banking Company." This declaration was set aside by *Alderson*, B., at chambers, on the ground that it was not conformable to the process. A summons was then taken out to amend the writ; and *Parke*, B., on the ground that the debt would be otherwise barred by the Statute of Limitations, ordered that the plaintiffs should be at liberty to amend the writ of summons, subsequent proceedings, appearance, &c., by stating therein the character in which the plaintiffs sue, and in which the defendants are sued, on payment of costs.

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The *Attorney-General* now moved to set aside the order of *Parke*, B.—The cases in which the Courts have allowed amendments of this nature are either where the process has not been served, or where it is merely sought to alter the description of the plaintiffs. This is an attempt to extend the practice to the case of defendants. It appears by affidavit that the money sought to be recovered was received by the banking company in the year 1840, and has been more than five years ago distributed among the persons who were shareholders of the bank in 1840. It also appears that the company is a fluctuating body, and that the present shareholders consist of a number of persons who were not shareholders in 1840. The 7 Geo. 4, c. 46, s. 9, enables banking co-partnerships to sue and be sued in the name of their public officers; and by the 13th section, execution upon any judgment obtained against the public officer may be issued against any member for *the time being* of the co-partnership. The effect of this amendment, therefore, is to render the present members liable, though they never had the money, whilst those persons who actually received it, and have ceased to be shareholders, are free from responsibility. Before the Uniformity of Process Act amendments were frequently allowed; after that act passed, the process was supposed to be statutable process, and not amendable. [*Parke*, B.—After the passing of the Uniformity of Process Act, the judges met for the purpose of considering whether they would in future amend writs, as attornies frequently mistook the forms of action. The majority of the judges thought that they could not exercise the same power of amendment as formerly. But, as stated by my brother *Alderson* in *Culverwell* v. *Nugee* (*a*), "that resolution was found to be productive of great evil in cases where the action would otherwise be barred by the statute. We therefore thought it right to retrace our steps, and in

(*a*) 15 M. & W. 560; 4 Dowl. & L. 32.

such case to allow an amendment." If the penalty be merely the loss sustained by the necessity of issuing a new writ, we determined not to assist the party; but if the penalty be the loss of the entire debt, we thought ourselves bound to help him.] There is a difference between the practice of this Court and that of the Court of Queen's Bench. In *Roberts* v. *Bate* (*a*) *Patteson*, J., says, "In *Lakin* v. *Watson* (*b*) the Court of Exchequer did allow the amendment; but with all respect for that Court, I cannot see why the amendment should be permitted for the purpose of saving the Statute of Limitations, more than on any other account. In one report of the last cited case my brother *Parke* is represented to have said, that the judges have resolved not to allow an amendment of this kind in future, except where by refusal the party would be deprived of his action. I think this has been misunderstood. There was some discussion how far writs of summons should be amended in future; but as to adding the name of a party, I disclaim having sanctioned it, and have no doubt this is a mistake in the report. I would not so extend our authority." [*Parke*, B.—That statement of my brother *Patteson* is perfectly correct; we never meant to say that we would amend by adding the name of a defendant. This point is settled by *Brown* v. *Fullerton* (*c*).] The amendment in effect changes the defendants, for the service has been upon them in their private capacity, and not as public officers, which latter service would require them to communicate the proceedings to the directors.

POLLOCK, C. B.—I consider the point as settled: if it were open, I am not sure that I should not think an amendment of process for the purpose of saving the Statute of Limitations the last thing we ought to allow. At

(*a*) 6 Ad. & E. 783.
(*b*) 2 C. & M. 685; 4 Tyrw. 839.
(*c*) 13 M. & W. 556; 2 Dowl. & L. 251.

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the same time I own that, in order to compel parties to be regular, it may be right to fine them in costs if they make a mistake, but that is very different from exacting as a penalty the forfeiture of the whole debt, which may amount to a large sum of money.

ALDERSON, B.—It is perfectly clear, that before my brother *Parke* allowed the amendment, he must have been satisfied that the service was on these defendants, not in their private capacity, but as public officers, and was so understood by all parties. Then the only error was in the description of the parties. Where is the injury in putting in the writ the words "public officers," when everybody understood that the defendants were sued as public officers?

PARKE, B., and ROLFE, B., concurred.

Rule refused.

April 23.

A cause, and all matters in difference between the parties, were referred to arbitration by order of Nisi Prius, which contained a clause enabling the Court, in case the award should be disputed, to remit the matters referred to the re-determination of the arbitrator. The attornies on each side, considering the award defective, agreed that it should be amended; and subsequently a judge's order was drawn up by consent, whereby it was ordered that the matters arbitrated upon should be referred back to the arbitrator, to make such alterations as he should think fit. The arbitrator altered the award, and re-delivered it, without giving notice to the parties of his intention so to do, and the amended award did not recite the judge's order:—*Held*, that as neither party requested the arbitrator to hear fresh evidence, he was not bound to give them notice. Also, that such amended award need not recite the judge's order.

BAKER v. HUNTER.

THIS cause, and all matters in difference between the parties, were referred to arbitration by order of Nisi Prius. The submission contained a stipulation, "that, in the event of either of the parties disputing the validity of the award, or of moving the Court to set the same or any part thereof aside, the Court should have power, at any time, to remit the matters thereby referred, or any or either of them, to the re-consideration and re-determination of the arbitrator."

After the award was delivered, the attornies on each side thought that there was an inconsistent finding on the face of the award; and thereupon they went to the arbitrator, and in his presence agreed, verbally, that the award should be considered as not delivered, and that the arbitrator should amend it. Subsequently a judge's order was drawn up by consent, whereby it was ordered that the "matters arbitrated upon herein should be referred back to the arbitrator to make such corrections or alterations as he should think fit." The arbitrator altered his award, and redelivered it within three days from the date of the judge's order, without giving notice to the parties of his intention so to do, or receiving any fresh evidence. It did not appear that the arbitrator was requested by either party to receive fresh evidence, or hear further arguments. The award did not recite the judge's order for the alteration.

Gurney now moved for a rule to set aside the award.—First, the arbitrator ought not to have altered his award without giving notice to the parties, so that they might have an opportunity of giving fresh evidence. It is true that, in *Howett* v. *Clement* (*a*), the Court of Common Pleas decided, that where an award is sent back to an arbitrator to be amended, he is not bound to give the parties notice to attend him thereon; but in that case the arbitrator was only enabled to correct a particular mistake, and the alteration required to be made was specifically pointed out; consequently the attendance of the parties before the arbitrator was wholly unnecessary. Here "*the matters arbitrated upon*" have been sent back; the effect of which is to open the whole case. *Nickalls* v. *Warren* (*b*) expressly decides, that where an order of reference contains a clause empowering the Court, if the award be disputed, to remit

(*a*) 1 C. B. 728. (*b*) 6 Q. B. 615.

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the matters for the re-consideration of the arbitrator, and the case is so remitted, the arbitrator must hear fresh evidence, if tendered, as in the original reference. Under this order the arbitrator might have decided differently upon any one of the issues; it was, therefore, his duty to give notice to the parties, in order that they might tender fresh evidence if they thought fit. [*Parke*, B.—It does not appear that the parties intimated to the arbitrator that they wished to give fresh evidence. *Pollock*, C. B.—The plaintiff complains that he was not allowed to exercise a right; but it does not appear that he had any right to exercise.] Secondly, the award is bad, inasmuch as it does not recite that the alteration was made under the authority of the judge's order. In *Christie* v. *Hamlet* (*a*), a case was referred to arbitration by a *judge's order*; but the award recited that the cause was referred by *order of Nisi Prius*; and the Court seemed to think it a nullity. [*Parke*, B.—That case only decided that, possibly, the Court would not grant an attachment to enforce the performance of such an award. An arbitrator need not recite his authority, and if he misrecites it, it is immaterial.]

PER CURIAM (*b*).—There will be no rule.

Rule refused.

(*a*) 2 M. & P. 316.
(*b*) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

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April 28.

EVANS v. UPSHER.

U., a copyhold tenant of the manor of S., was owner of sixteen separate tenements, holden by sixteen separate copies of court-roll, and sixteen separate yearly quit rents. He was admitted to the above tenements at five different times, and by five different titles. An inclosure act passed directing commissioners to allot the waste lands in S. among the owners thereof, in proportion to their rights and interests in the same. The act also directed that the allotted lands should be held by the allottees under the same tenures, rents, customs, and services as the lands in respect of which they were allotted would have been in case the act had not been passed; and that, where the lands were held under different titles, or for different estates, the commissioners should distinguish the lands held for each of such estates and titles, and set out the allotments accordingly. The commissioners allotted to U., in respect of his sixteen copyhold tenements, five pieces of land, amounting in the whole to forty-nine acres, but did not distinguish in respect of which of the sixteen tenements, or of what particular estates, the five pieces were allotted. U. afterwards surrendered to the defendant the fifth allotment, and the defendant was duly admitted to the same. Before the inclosure act passed, when any person was admitted in severalty to a part of a copyhold tenement, the steward of the manor was entitled, upon such admission, to the same amount of fees as if such person had been admitted to the whole of such tenement. In an action by the steward to recover sixteen fees in respect of the defendant's admission to the fifth allotment:—*Held*, that such allotment must be considered as an allotment of a portion of each of the sixteen former tenements, and that, therefore, the steward was entitled to recover sixteen fees.

DEBT to recover the sum of 7*l.* 0*s.* 8*d.*, for fees due from the defendant to the plaintiff, as steward of the manor of Sutton, in the Isle of Ely. Plea, payment into Court of 2*l.* 5*s.* 8*d.*

At the trial, before *Parke*, B., at the Spring Assizes for the county of Cambridge, 1846, a verdict was found for the plaintiff, 4*l.* 15*s.* debt, subject to the opinion of the Court upon the following case:—

The plaintiff is steward of the manor of Sutton, of which the dean and chapter of Ely are the lords, and the defendant is a copyholder of the same manor. Before and at the date of the inclosure act hereinafter mentioned, and of the award of the commissioners under it, Thomas F. Upsher, a copyhold tenant of the manor, was owner of and stood on the copy of court rolls admitted to sixteen separate tenements, holden by sixteen separate and distinct copies of court-roll, and sixteen separate and distinct yearly quit rents. He was admitted to the above tenements at five different times, and by five distinct titles. The sixteen tenements were, before the inclosure, situated in the open uninclosed fields in the parish of Sutton, and which were afterwards inclosed under the said act of Parliament. T. F. Upsher was also entitled to certain copyhold rights of common and of sheep-walk, appurtenant to the sixteen tene-

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ments. The act of Parliament for inclosing the parish of Sutton passed in 1838. The commissioners made their award in June, 1840, and allotted to T. F. Upsher, in respect of his sixteen copyhold tenements and his right of common, &c., five pieces of land, amounting in the whole to 49 acres, 3 roods, 18 perches. The commissioners did not, under the 68th section of the act of Parliament, distinguish in respect of which of the said sixteen tenements, or of what particular estates, the five pieces were allotted. In January 1843, T. F. Upsher surrendered to the defendant the fifth allotment, and in April 1843 the defendant was duly admitted to the same. The sum of 7*l.* 0*s.* 8*d.* is claimed by the plaintiff in respect of the defendant's admission to the fifth piece of land. The lords of the manor of Sutton were, by the custom of the manor, upon every admission to every copyhold tenement holden by a separate and distinct copy of court-roll, entitled to a fine certain, namely, the amount of one year's quit-rent upon such tenement; and where several copyhold tenements passed by one admission, the lords were entitled to one year's quit-rent upon all the separate copyhold tenements which passed by such descent and admission. Before the inclosure act was passed, when several copyhold tenements, holden by separate and distinct copies of court-roll, passed, the steward of the manor was entitled to receive, in addition to the other fees, as many sums of 4*s.* 4*d.* each for himself, and as many shillings for the clerk, and as many shillings for the cryer, as there were separate copyhold tenements. And in cases where any person is admitted in severalty to *a part* of a copyhold tenement, holden of the said manor by one copy of court-roll, the steward is entitled, upon such admission, to the same amount of fees as if such person was admitted to the *whole* of such tenement. The plaintiff therefore contends, that, upon the admission of the said defendant to the fifth piece of land allotted to the said T. F. Upsher, he is entitled to fees as upon an admission to six-

teen separate and distinct copyhold tenements, as if the said inclosure act had not passed, and as if the defendant had been in fact admitted to the whole of the said sixteen copyhold tenements above described, or to some part of each of such sixteen tenements; and accordingly the sum of 7*l.* 0*s.* 8*d.* is calculated upon that principle as follows:—

	£	s.	d.
Presenting Surrender	0	13	4
Admission Fees, to 16 copies, at 4*s.* 4*d.* each	3	9	4
Clerk's Fees, 16 copies, 1*s.* each .	0	16	0
Cryer's Fees, 16 copies, 1*s.* each .	0	16	0
Respiting Fealty	0	1	0
Stamps and Parchment	1	5	0
	£7	0	8

If the plaintiff was entitled to charge fees upon the defendant's admission as upon an admission to sixteen separate and distinct copyhold tenements, it was agreed that 7*l.* 0*s.* 8*d.* was a reasonable sum for such fees.

If the plaintiff was entitled only to charge fees upon the defendant's admission as upon an admission to one copyhold tenement only, it was agreed that the sum paid into Court, 2*l.* 5*s.* 8*d.*, was a reasonable sum for such last-mentioned fees.

The question for the opinion of the Court was, whether the said plaintiff was entitled to charge and recover fees for and upon the defendant's said admission under the said surrender, as upon an admission to sixteen separate and distinct copyhold tenements, or only to one single copyhold tenement.

If the Court should be of opinion that the plaintiff was entitled to charge and recover fees upon the defendant's admission as upon an admission to sixteen separate and distinct copyhold tenements, then the verdict was to be

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entered for the plaintiff for 4*l.* 15*s.* debt, and 1*s.* damages; but if the Court should be of opinion that the plaintiff was entitled to charge and recover fees upon the said admission of the defendant, as upon an admission to one copyhold tenement only, then a verdict for the defendant was to be entered.

Martin (*Worlledge* with him) for the plaintiff.—The question is, whether the steward of the manor of Sutton is entitled to receive sixteen fees in respect of the surrender to the defendant of the fifth allotment, containing five acres, or whether he is entitled to receive one fee only. It is submitted that he is entitled to sixteen fees. In Scriven on Copyholds, pt. 1, c. 9 (*a*), the subject of a steward's right to fees is fully discussed, and it appears that those fees, like the lord's fine on admittance, are established by custom. In *Attree* v. *Scutt* (*b*) the question was, whether, if two persons hold a copyhold as tenants in common, and the one surrender his moiety to the other who is admitted, the latter shall hold the land, in respect of the lord and the steward, for the purpose of fines and fees on admittance, as *one* tenement or *two;* and it was held that, the estate or interest in the land having been once divided in severalty continued several, notwithstanding the same were afterwards united in one person. Although that decision was spoken of with disapprobation by the Court, in delivering judgment in *Garland* v. *Jekyll* (*c*), yet the present question is not affected by the latter case. The 56th section (*d*) of the act for in-

(*a*) P. 392, ed. 1846.

(*b*) 6 East, 476.

(*c*) 2 Bing. 302.

(*d*) Enacts: "That when any proprietor of lands which shall be divided, allotted, inclosed, or exchanged, or any person to whom any allotment is made by virtue of this act, shall hold such lands, or the lands in respect of which such allotment is made, under different titles, or for different estates, the said commissioners shall ascertain and distinguish the lands held for each of such estates, and under each of such titles respectively, and shall accordingly in their award

closing lands in the parish of Sutton, (1 Vict. c. ii.), directs that where lands in respect of which allotments are made are held under different titles, or for different estates, the commissioners shall distinguish the lands held for each of such estates, and under each of such titles, and shall in their award set out and distinguish distinct and several allotments for such respective lands. If in the present case those directions of the legislature had been obeyed, the forty-nine acres allotted to the defendant would have been apportioned to the several tenements, and on their conveyance a fee would have been clearly payable to the steward in respect of each. The allotment of the five acres must be considered as made in respect of a portion of each of the sixteen tenements. It is true that a steward of a manor is not entitled to several fees upon the admission of a person to several distinct copyholds, unless there be a custom to that effect; and where no such custom exists, he can only recover upon a quantum meruit: *Everest* v. *Glyn* (*a*); *Searle* v. *Marsh* (*b*). Here, however, there is a custom to charge in respect of each separate tenement. In Sugden's Vendors and Purchasers, it is said (*c*), "Where an allotment is made generally in respect of all the tenant's lands, it is necessary to

set out and distinguish distinct and several allotments for such respective lands; and they the said commissioners are hereby empowered to apportion any drainage-taxes payable for the current year, in which possession may be delivered of any allotments made by them under this act, between the owners of the land so allotted and the persons to whom such allotments shall be made, in such manner as they may deem just; and the sums of money to be paid by such parties respectively, and also any arrears of taxes due in respect of such lands at the time fixed for delivering possession of the allotments by the said commissioners, shall and may be levied and raised by the said commissioners from the parties or persons deemed by them liable to pay the same, in like manner as the charges of carrying this act into execution, and shall be paid over to the parties or persons deemed by them entitled to receive the same."

(*a*) 2 Marsh. 84; 6 Taunt. 425.

(*b*) Cited in *Everest* v. *Glyn*.

(*c*) Vol. 2, 433, c. 15, 11th ed.

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make out a title to them all." The title, therefore, to the most minute portion of the land allotted depends upon the title to the estate in respect of which the allotment is made. These fees are a compensation to the steward for making the title to each tenement complete. It would be strange to hold that the lord is entitled to sixteen fines, and the steward to one fee only. Such a doctrine would be contrary not only to justice, but to the express provisions of the act of Parliament. By the 55th section (*a*) of that act, all lands allotted shall be held under "the same tenure, rents, customs, and services as the lands in respect of which such lands are allotted would have been held in case that act had not passed." Here there was a customary payment of a fine to the lord, and of a fee to the steward, upon the alienation of every tenement. Besides, the office of steward is entailable under the statute de donis conditionalibus, West. 2, 13 Edw. 1 (*b*), and the right of the lord to appoint to an

(*a*) Enacts: "That, subject to the power of enfranchisement hereinbefore contained, all such lands as shall be allotted by virtue of this act, shall be held by the person to whom they are allotted under the same tenures, rents, customs, and services as the lands in respect of which such lands are allotted would have been held in case this act had not been passed; and the lands allotted in respect of freeholds shall be deemed freehold, and the lands allotted in respect of copyhold or customary lands shall in like manner be deemed copyhold or customary lands, and shall be held of the lords of the manor, under the same rents, and by the same customs and services as the copyhold or customary lands, in respect of which they may be allotted, were or ought to have been held, and shall pass by the like surrenders, assurances, and documents as the copyhold or customary lands, in respect whereof such allotment shall be made, now do; and the lands allotted in respect of leasehold lands shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the lands in respect of which they may be allotted were held, and the remainder or reversion thereof shall be and remain vested in the same lessors respectively as the remainder or reversion of such other lands was vested before the passing of this act, any law or usage to the contrary notwithstanding."

(*b*) 2 Bla. Com. 113; Co. Lit. 18. b., 19. a.

entailable office is a "custom" within the meaning of the 55th section of the inclosure act. The Court will put such a construction upon that act as will carry into effect the intention of the legislature, which was to bring waste lands into cultivation, at the same time preserving the rights of parties under any existing custom. In contemplation of law the defendant is in possession of a portion of each of those sixteen tenements, and ought therefore to pay sixteen fees.

Cowling (*Bircham* with him) for the defendant.—The plaintiff is not entitled to sixteen fees; if that were so, he would be entitled to sixteen fees upon *each* of the allotments. As a general rule, a steward of a manor is only entitled to fees in respect of services performed, and unless there be a custom he must sue upon a quantum meruit. *Everest* v. *Glyn* (*a*) is a distinct authority to that effect. In the present case the steward's claim is founded on custom, but whatever usage existed prior to the act of Parliament, it cannot apply now. The steward is never once mentioned in the act; indeed such an office need not necessarily exist, as the lord might himself perform the duties of steward. It is obvious that the legislature never intended to reserve the rights of the steward, for by the 53rd section (*b*) the

(*a*) 2 Marsh. 84; 6 Taunt. 425.

(*b*) Enacts: "That it shall be lawful for the owners of any lands of copyhold or customary tenure, within and parcel of the said manor of Sutton, whether such owners shall be corporations or tenants in fee simple, or in fee tail, general or special, or for life; and for the guardians, husbands, committees, or attornies of, or acting for any such owners as aforesaid, who shall happen to be respectively infants, femes covert, lunatics, or under any other legal disability, or who shall be beyond the seas, or otherwise disabled to act for themselves, and for trustees or feoffees for charitable or other uses, to contract and agree with the lords for the time being of the said manor, for the absolute and perpetual enfranchisement of all or any of such copyholds or customary lands, and all allotments in respect thereof, and for the extinguishment of the quit-

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owners of copyhold lands are empowered to enfranchise them, and to extinguish quit-rents and other rights of the lords on compensation made *to them*, but there is no provision for compensation to the steward. If this land had been enfranchised under that section, the steward's right to fees would have been altogether destroyed. The general saving clause (s. 79) has no bearing on the question, for it only relates to rights "of, in, to, or out of" the land authorised to be allotted. The object of the legislature was to enable the owners of scattered portions of waste land more effectually to cultivate them, by uniting them in one allotment. The first section recites (amongst other things), that, "whereas the said open fields, and commonable and lammas lands, or some parts thereof, are dispersed in small parcels, and the properties of the several owners thereof are much intermixed, and the said fields and lands, and also the said waste lands and grounds, are in their present state incapable of much improvement, and it would therefore be of great advantage to the persons entitled to or interested in the said fields, commonable or lammas land, &c., if the same were divided and allotted into and amongst them, according to their respective rights and interest therein," &c. The commissioners are first to set out a piece of land not exceeding three acres, for the recreation of the poor: sect. 39. By the 40th section, allotments are to be made to the lords of the manor as compensation for their right of soil. Then, by the 41st section (*a*), the commissioners are to allot

rents, and all other rights of the lords, in, over, and upon the same for a compensation, either in money or land, as in any such contract shall be specified and declared."

(*a*) Enacts: "That the said commissioners shall apportion, divide, set out, and allot the residue and remainder of the several open fields, commonable, lammas and waste lands and grounds, and all other the uninclosed lands within the said parish of Sutton, (other than and except a certain tract or parcel of land called Middlemoor), unto and amongst the several owners and proprietors thereof, and persons and corporations who shall be entitled to any estate, right, or interest therein, in such quan-

the residue of the waste lands amongst the owners, in such shares as the commissioners shall determine to be an equitable compensation for their interest in such lands. The 42nd section requires the several allotments to be inclosed, ditched, and fenced, so that each allotment is made one entire tenement. The 56th section empowers the commissioners to give an owner of lands one tenement in lieu of many, where all are held for the same estate and under the same title; and it is submitted that it is the duty of the commissioners so to do. Then if the commissioners were authorised to award one or five tenements at their option, there is an end of the steward's right. If the title to any part of the sixteen tenements was bad, the allotment made in lieu thereof could not be recovered by ejectment, but the only course would be to apply for a feigned issue under the 18th section. Even conceding that the commissioners ought to have ascertained and distinguished the several tenures under which the lands were holden, and the several rents and fines to which they were subject, the plaintiff should have required them to do so under the provisions of the 68th section (*a*). *Holloway* v.

tities, shares, proportions, and situations as the said commissioners shall adjudge and determine to be proportionate to the value of, and a just equitable compensation and satisfaction for, their several and respective rights, property, and interest in the said fields, lands, and grounds."

(*a*) Enacts: "That if from want of information or other cause, the said commissioners shall have omitted to distinguish in their award the several tenures under which any of the said lands are or shall be holden, or the several rents, payments, fines, customs, and services to which the same are or shall be subject, or the different estates or titles for or under which the same are or shall be held, or to set out and award several and distinct allotments as is hereby required; it shall be lawful for the said commissioners, at any time within twelve calendar months after the date and execution of their award, upon request in writing to them made by any proprietor of any such allotment or lands, or other person interested therein, or his agent, to do all such acts as shall be necessary for supplying such omission, and for that

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Berkeley (*a*) is an authority to shew, that, where a copyhold tenement holden by heriot custom becomes the property of several as tenants in common, the lord is entitled to a heriot from each of them, but if the several portions are reunited in one person, one heriot only is payable.

Martin replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. The Inclosure Act certainly contemplates the case of the commissioners being called upon to award in respect of each title, and it gives to the proprietors of land, or the parties interested, authority to call upon the commissioners so to do. That has not been done in the present case, and the result of the award is, that an allotment has been made in respect of each of these sixteen tenements, but it does not appear on the face of the award how much land is allotted in respect of each. However, in point of law, a certain portion of the allotment must be considered as forming part of each of the sixteen tenements, and to be held on the same tenure as those tenements. So that, if any person who had been under disability, arising

purpose to examine witnesses, and proceed as if their award had not been made, and by any deed or instrument under their hands and seals to distinguish and set out the allotments and lands held by different tenures, and the several rents, payments, fines, customs, and services, to which the same respectively may be subject, and also the allotments and lands held by, for, or under different estates or titles respectively, in the same manner as they are hereby authorised to do by their award; and every such separate instrument shall be enrolled and deposited with the award of the said commissioners, and shall thenceforth be deemed and taken to be part thereof, to all intents and purposes; and all the expenses which shall be reasonably incurred, in or about such subsequent inquiry, or separate instrument as aforesaid, and the enrolment thereof, shall be paid by the party who shall have requested the said commissioners to make and execute the same, or by his heirs, executors, or administrators."

(*a*) 6 B. & C. 2.

from coverture, infancy, or the like, which would prevent the Statute of Limitations from operating, should claim title to one of these sixteen tenements, he would have a right to claim in addition some portion of this allotment, although in the award it is allotted in one entire piece. The consequence is, that, in reality, the person conveying this allotment has conveyed a portion of the sixteen tenements, and the steward is therefore entitled to claim sixteen fees in respect of this fifth allotment. However hard it may be, that is a matter which should have been provided for when the question was before the legislature; we are bound to deal with the case as we find it.

PARKE, B.—I am of the same opinion. The question submitted to us is, whether the plaintiff is entitled to fees, upon the defendant's admission to the fifth allotment, as upon an admission to sixteen separate copyhold tenements, or to one tenement only. In the former case it is agreed that the sum charged is a reasonable compensation. It is stated as part of the custom, that "in cases where any person is admitted in severalty to a part of a copyhold tenement, holden of the said manor by one copy of court roll, the steward is entitled upon such admission to the same amount of fees as if such person was admitted to the *whole* of such tenement." That, being so found, enables us to arrive at the conclusion that the plaintiff is entitled to sixteen fees. It appears that the whole allotment of forty-nine acres was made in respect of sixteen different tenements, consisting either of scattered portions of waste, or of outlying fields. The effect of the act of Parliament is to substitute the allotment of forty-nine acres for the former sixteen tenements, and the commissioners ought to have gone on to say how much they allotted in respect of each tenement, and then the title to each portion of the allotment would constitute a portion of the former tenement, the in-

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tention of the legislature being to substitute one portion of the common fields for what was before a portion of the ancient tenements. The proprietors, however, have omitted to avail themselves of the provisions of the 68th section. Had they done so, it would have been of great advantage to them, since the title to the whole allotment would not have been affected by any question as to part, and consequently, if it turned out that one tenement belonged to some third person, he might have brought ejectment, and recovered that part of the allotment which had been substituted for the particular portion of tenement. As it is, the forty-nine acres remain as originally set out in the award, so that sixteen undivided parts of the allotment represent the ancient tenements, and the fifth allotment must be considered as a portion of each of the sixteen former tenements. The result is, that, looking to the custom as stated in the case, that where there is a surrender and admission to different tenements, a fine must be paid upon each tenement, the plaintiff is entitled to recover sixteen fees.

ROLFE, B.—I am of the same opinion. The difficulty I had arose from the strong doubt which I entertained—and which is not entirely removed—whether it can be truly found that the custom as alleged does exist. It is difficult to give credence to the statement, that from time immemorial, whenever a person has been admitted in severalty to part of a copyhold tenement, the steward is entitled upon such admission to the same amount of fees as if such person was admitted to the whole of such tenement. Here, in point of fact, Upsher has surrendered to the defendant copyhold land; the steward is therefore entitled to *some* fee. What that fee is, must depend upon whether the land surrendered is part of the sixteen tenements. Under the Inclosure Act the commissioners have allotted in gross a piece of land containing forty-nine acres, as a compensation for

the whole sixteen tenements, and that allotment was not afterwards divided and distinguished in the manner provided for by the 68th section. So that the owner of the sixteen copyhold tenements retains those sixteen tenements, and instead of his rights of common, has forty-nine acres of land awarded to him. The result is, that he has a sixteenth part of forty-nine acres annexed to each of those tenements. Whereas before the inclosure he had sixteen tenements, he now has those sixteen tenements, and has also annexed to each a sixteenth part of the forty-nine acres. Then, by the custom of the manor, the steward is entitled, upon the admission of a person to part of a tenement, to the same fee as if he had been admitted to the whole. Upsher surrenders to the defendant a portion of the gross forty-nine acres, that is, a portion of sixteen different adjuncts to his sixteen different tenements, consequently the steward is entitled to fees as upon the admission of a person to the sixteen tenements.

PLATT, B.—At the commencement of the argument, I was struck with the effect of a judgment in favour of the plaintiff, because if the allotment was divided into many parts, a proportionate amount of fees would be due to the steward. But the question is not one with reference to the amount, but only as to the custom, that is, whether the steward can demand one fee only, or whether he is right in demanding sixteen. It appears, that whilst Upsher was the owner of sixteen different patches of land in the common fields, an act of Parliament passed for the purpose of allotting the open fields and commonable lands amongst the owners, in shares commensurate to their interest in such lands. By the act the land allotted is to be held upon the same tenure, and to be liable to the same rents, customs, and services as before. Forty-nine acres of land in solido were allotted to T. Faux Upsher, in respect of all his rights,

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without any division for the purpose of shewing in what way the allotment was to be applied to the sixteen tenements. Therefore, inasmuch as the act implies that the allotment made is equivalent to and liable for the burthens of the ancient land, the owner of the forty-nine acres is liable to sixteen rents, and when he conveys a portion of that forty-nine acres, he conveys sixteen undivided parts, and to those sixteen parts the surrenderee is admitted. In fact, there are so many estates conveyed, and the steward is entitled to a fee upon each, unless the act of Parliament has deprived him of it. It seems to me that the act does not in any way affect the steward's right. The words, "tenures, rents, customs, and services," in the 55th section, do not apply to the stewards, but to copyholders and the lords of the manor, the act being a mere parliamentary agreement between the lords and those who have the rights of common, without any reference to the steward. Undoubtedly the steward is a most useful officer; he is keeper of the court-rolls, and his duty is to make the proper entries on them. Here it is found that a customary fee is payable upon admission to any estate in the manor, and inasmuch as there are sixteen estates to which the defendant is admitted, the steward is entitled to sixteen fees.

Judgment for the plaintiff.

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April 27.

EJECTMENT to recover possession of a messuage and premises, in the parish of Llanrwst, in the county of Denbigh. At the trial, before Lord *Denman*, C. J., at the Summer Assizes for Denbighshire, 1846, the following facts appeared in evidence:—

By indenture of 1st November, 1784, the Baroness Willoughby de Eresby, and her husband, Sir P. Burrell, granted a lease of the premises in question (inter alia) to Henry Jones, for the lives of his son Richard and his two daughters. By his will, dated in 1789, Henry Jones devised all his estate and interest in the premises to Ann, his widow, her heirs and assigns, and in 1791 he died, leaving two sons, John the elder, and Richard, and his two daughters, him surviving. In 1793, Ann Jones, the widow, for a valuable consideration conveyed, by indentures of lease and release, the estate so devised to her, to her second son Richard, and the heirs of his body; and in the indenture of release was contained a proviso, that if Richard should have no child or children lawfully begotten at the time of his decease, or within reasonable time afterwards, then the limitation thereby made should cease, and the estate should revert to the said Ann Jones, her heirs and assigns. Ann Jones died in the year 1799. John, the eldest son, died in 1801, leaving (amongst other children) two sons, John and Lewis. John, the elder, died in 1808, without issue, upon which Lewis became the heir of his grandfather, Henry Jones, and also of his grandmother Ann. In 1811, Richard

In 1784, premises were leased to H. J. for three lives. H. J. by his will devised all his estate and interest in the premises to his wife A. J., her heirs and assigns. A. J. in 1793 conveyed the estate so devised to her, to her son R. J., and the heirs of his body, with a proviso that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A. J., her heirs and assigns. In 1811, R. J. purchased the reversion in fee in the premises, expectant on the lease for lives, which was duly conveyed to him, and at the same time an old satisfied term of 5000 years affecting the premises was assigned to a trustee for him, to attend the inheritance. R. J. died in 1812, without issue, leaving his nephew L. J. his heir-at-law, and the heir-at-law of A. J. The lease for lives determined in 1835. For upwards of twenty years from the death of R. J. the premises were held adversely to L. J.:—*Held*, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the lease for lives in 1835.

Held, also, that since the stat. 8 & 9 Vict. c. 112, the outstanding term would have been no defence to an ejectment by L. J., or any person claiming under him.

That branch of the 3rd section of the Limitation Act, 3 & 4 Will. 4, c. 27, which relates to estates in reversion, expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate.

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Jones purchased from Lord Willoughby de Eresby the reversion in fee of the premises contained in the lease of 1788, and the same was conveyed to him by indentures of lease and release, dated 1st and 2nd May, 1811. At the same time, an outstanding term for 5000 years, created in 1779, for the purpose of securing portions to younger children of the Willoughby family, but since satisfied, and affecting this and other property, was assigned, for Richard Jones's protection, to a trustee, to attend the inheritance of the premises so conveyed to him. In 1812, Richard Jones died without issue, leaving his nephew Lewis Jones his heir-at-law. Lewis attained the age of twenty-one in 1813, and died in 1834. After Richard's death, his widow continued in uninterrupted possession of the premises until her death in 1843. The lease of 1788 determined by the death of the last cestui que vie, in 1835. This ejectment was brought in 1846, the lessor of the plaintiff, Mrs. Hall, claiming the estate as heir to her brother, Lewis Jones. The trustee to whom the term of 5000 years was assigned in 1811, had died intestate, and no administration had been taken out to his effects. Before the declaration in this cause was served, application was made, on the part of the lessors of the plaintiff, to the Ecclesiastical Court, for a grant of administration to some person, in whose name, as the legal owner of the term, a demise might be laid: but that Court refused the application, on the ground that it was unnecessary since the stat. 8 & 9 Vict. c. 112, which had absolutely put an end to the outstanding term.

It was contended for the defendant, at the trial, first, that the estate pur auter vie merged in the reversion in fee, on the purchase of the latter by Richard Jones in 1811, or at all events at his death in 1812, on the union of both rights in Lewis Jones, and so that Lewis Jones's right of entry was barred by the adverse possession had since that time by Richard Jones's widow; and secondly, that the outstanding term still subsisted as a protection to the defendant's right to the inheritance, acquired by such adverse

possession. For the plaintiff it was argued, first, that the lessor of the plaintiff, Mrs. Hall, had a fresh right of entry on the expiration of the lease for lives in 1835, the merger having been prevented by the proviso in the deed of 1793; and secondly, that the term, having been satisfied before the 31st December, 1845, was destroyed by the stat. 8 & 9 Vict. c. 112. The Lord Chief Justice ruled both points in favour of the plaintiff, and directed a verdict accordingly, giving the defendant leave to move to enter a nonsuit.

In Michaelmas Term, the *Attorney-General* obtained a rule nisi accordingly, against which, at the sittings after last Hilary Term, (Feb. 12),

Martin, Townsend, and *Egerton* shewed cause.—This ejectment is brought in time, having been commenced within twenty years next after the right of entry of Lewis Jones, through whom the lessors of the plaintiff claim title, first accrued. Lewis had two distinct rights; he was the heir both of his grandmother, Ann Jones, and of his uncle Richard. It was not until the determination of the estate pur auter vie, which he had as heir of Ann, in 1835, that the estate in reversion, which he had as heir of Richard, became an estate in possession; and thereupon his heir acquired a new right of entry, and from that time the period of twenty years given by the Statute of Limitations is to be computed. This depends, no doubt, upon the question whether the estate pur auter vie had before then merged in the reversion in fee. And, first, it did not merge in 1811, when Richard Jones acquired the reversion by purchase, by reason of the proviso in the deed of 1793. Under that deed Richard acquired an estate pur auter vie, defeasible on a condition subsequent, namely, his dying without leaving issue. It is clear that such a condition is perfectly valid, as it must take effect within his life: Fearne, Cont. Rem. 468. Nor is it necessary that the grantor should have retained to herself any reversion; for it is clear law that the

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grantor or his heir, although without any reversion, might enter on breach of the condition, at any time during the estate granted subject to the condition: Shep. Touchst. 149; Co. Litt. 302. *b*; *Doe* d. *Freeman* v. *Bateman* (*a*). But if the estate on condition merged in the fee, the right of Ann and her heirs to enter for breach of the condition would be defeated. The condition cannot be destroyed by the act of the party who has the estate subject to it. A merger can never affect third parties. The intervening estate of Ann Jones and her heirs, therefore, prevented the purchase of the fee from working a merger against them.—On this part of the case they cited 3 Preston's Conveyancing, pp. 50, 446, 447, 449; Co. Litt. 337. *b*; 6 Cruise's Dig. 467; *Purefoy* v. *Rogers* (*b*); *Bracebridge* v. *Cooke* (*c*); *Wiscot's case* (*d*); and *Bowles's case* (*e*).

Secondly, no merger took place on the death of Richard in 1812. Lewis Jones then became entitled, as heir of Richard, to the reversion in fee expectant on the determination of the estate pur auter vie, and he was also a special occupant, being, as heir of Ann, entitled to the possession of the property for the remainder of the estate pur auter vie. On the breach of the condition on which Richard held the lease, by his dying without issue, Lewis, as heir of Ann, might have entered for the condition broken: Fearne, Cont. Rem. 381, n. 1; *Hammington* v. *Rudyard* (*f*): he never, however, did in fact enter, and until entry that estate would not vest in him, but he would have a right of entry merely: Shep. Touchst. 153. Now the law of merger does not apply to rights of entry. In Preston on Conveyancing, vol. 3, p. 55, the author says, "To call the doctrine of merger into effect, there must of necessity, and at least, be two *estates*. On this head the law is positive; indeed it is demonstrably clear, that unless there be two estates in the same person in the same land, there is not any

(*a*) 2 B. & Ald. 168.
(*b*) 2 Saund. 380.
(*c*) Plowd. 416.
(*d*) 2 Rep. 60 a.
(*e*) 11 Rep. 80.
(*f*) Cited 10 Rep. 52 a.

estate in that person to merge, or occasion a merger. A mere right or title will not suffice." The junction of two *rights*, therefore, in the same person in the same land, will not occasion a merger of one in the other; and here Lewis had no more than a right of entry to either estate; and he had those two rights subject to different liabilities. The estate pur auter vie would, by the Statute of Frauds, 29 Car. 2, c. 3, s. 12, be assets of Ann by descent in his hands, and so liable to her debts, while the reversion in fee which he took under Richard would be chargeable with Richard's debts, as assets of Richard by descent: 6 Cruise's Dig. 479, and *Platt* v. *Sleap* (*a*), are authorities to shew that the meeting of mere rights in the same person will not work a merger. [*Parke*, B.—The case of *Platt* v. *Sleap* is not strictly in point. That was a case where the husband was entitled to the term jure proprio, and to the reversion jure uxoris. Here Lewis Jones was entitled to the two rights jure proprio, although as heir of different persons.]

If, then, there was no merger in this case, the Statute of Limitations, 3 & 4 Will. 4, c. 27, is no bar to the claim of the heir of Lewis; because, in the case of a reversion, the time, by sect. 3, is to run only from the period when the estate became an estate in possession. Here Lewis had a reversionary estate which did not come into possession until 1835, on the determination of the lease for lives. [They referred to *Doe* d. *Davy* v. *Oxenham* (*b*), and *Grant* v. *Ellis* (*c*).]

Lastly, the plaintiff is entitled to recover, notwithstanding the want of a demise in the name of the assignee of the outstanding term, for the term is absolutely destroyed by the operation of the 8 & 9 Vict. c. 112. It clearly falls within the enacting part of that statute, for it is a satisfied term, which by express declaration was on the 31st December, 1845, attendant upon the inheritance of the estate.

(*a*) 1 Cro. Jac. 275. (*b*) 7 M. & W. 131. (*c*) 9 M. & W. 113.

remainder would have been under the same circumstances: 6 Cruise, Dig. 472; 3 Preston on Conveyancing, 50.

Secondly, there was at all events a merger, when upon the death of Richard both estates vested in Lewis, his heir. [*Parke*, B.—They say on the other side, that, as to the estate pur auter vie, it was nothing but a condition and a right of entry, but no estate till entry for breach of the condition.] If the condition took effect by the death of Richard, the estate then devolved upon Lewis by force of the original deed, without entry, just in the same manner as the same estate originally vested in Richard. And it cannot be disputed that both estates vested in Lewis, if at all, in the same right. In *Platt* v. *Sleap*, the estates came to the party in different rights. But to take the converse of that case, there is no doubt that where there is a term of years in the wife, and the reversion devolves on the husband in his own right, the term being a chattel interest which the husband has a right to dispose of, there will be a merger. Here Lewis had the greater estate as heir of Richard, the less as heir of Ann, by force of the condition, and both of them jure proprio.

But, thirdly, even if there was no merger of the two estates, the Statute of Limitations is a bar to this claim. It is clear that it is so, unless this is prevented by that branch of the 3rd section relied on for the plaintiff, namely, that "where the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession." Then the 5th sect. shews when such estate or interest is to be deemed to have become an estate or interest in possession, namely, by the determination of any estate or estates in respect of which the land shall have been held, or the profits thereof received, notwithstanding

(Lady Willoughby) demised the messuage, &c., in question, to Henry Jones, his heirs and assigns, for the lives of Richard Jones his second son, Catherine Jones, and Hannah Jones, at 3*l.* 13*s.* per annum, and livery of seisin was duly made. Henry Jones, on the 30th of May, 1789, devised the messuage, &c. to his wife Ann Jones, her heirs and assigns, to hold to the use of his said wife, her heirs and assigns, during the term, and he died soon afterwards. On the 2nd of October, 1793, Ann Jones, by indenture of that date, between her and her second son, Richard Jones, (the ancestor of the lessor of the plaintiff, Hannah Hall), for a valuable consideration, conveyed the messuage, &c., to Richard Jones, his heirs and assigns, to the use of Richard Jones, his heirs and assigns, during the remainder of the said term: provided, that if Richard Jones should have no child or children lawfully begotten, and living at the time of his decease, or within reasonable time afterwards, then the limitation should cease, and the messuage revert to Ann Jones, her heirs and assigns. In May 1811, Richard Jones purchased the reversion in fee from the Hon. Peter Burrell, heir of Sir Peter. Richard died in January 1812, without issue, leaving Lewis Jones, his nephew, his heir-at-law. On the death of Richard, the term reverted to the heirs of Ann, who had died in 1799. In January 1812, Lewis Jones was heir-at-law of Ann, and therefore was entitled to the term, but he did not take possession, and the property in question continued to be occupied by others than those entitled. The last life in the lease fell on the 16th of January, 1835, and the lessor of the plaintiff Hannah, being heiress-at-law both of Lewis and Richard Jones, brought this ejectment. It was tried before Lord *Denman*, at the last summer assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court upon points reserved.

The defendant contended, that the term merged, either by the purchase of the reversion by Richard in 1811, or on his death in 1812, by the descent of his reversion to his heir Lewis,

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who had the term as heir-at-law to Ann Jones; and, consequently, that the lapse of more than twenty years since 1812 was a bar; and secondly, he contended, that if there was no merger, and if Lewis Jones had two separate estates or interests, one in the term as heir of Ann Jones, and another in the reversion as heir of Richard, still he and those claiming under him were barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. And we are of that opinion, so that it is unnecessary to decide the question whether the term merged in the reversion or not.

By the 3rd section, the title of Lewis to the term, as heir of Ann, would be deemed to have accrued when it became an estate or interest in possession, that is, at the death of Richard without children living, or born in due time afterwards. By the 5th section, his right to the reversion as heir of Richard, supposing he had no other title, accrued at the end of the term in 1835. Mr. *Welsby* contended, that this section applied to those cases only where another person than the termor was reversioner. And we think his argument was well founded, and that this appears from the consideration of the 20th section, which is as follows:—"That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeazance of such estate or interest in possession." Here, in the mean-

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time, the land had not been recovered by any person, and consequently, Lewis Jones's right in respect of his estate in possession having been barred by the determination of the period of twenty years from 1812, the right of the person claiming the reversion through him was barred also.

The lessor of the plaintiff is, therefore, not entitled to recover, and it becomes unnecessary to consider the effect of the satisfied term proved by the defendant to exist, though we have no doubt that it is to be deemed to have absolutely ceased and determined, under the stat. 8 & 9 Vict. c. 112, s. 1, on the 31st of December, 1845, and consequently would have afforded no defence to this ejectment (*a*).

Rule absolute.

(*a*) See *Doe* d. *Cadwalader* v. *Price*, ante, 603.

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In trespass, where the defendant pleads lib. ten. in J. S., and justifies the trespasses as the servant of J. S., and by his command, a replication that the defendant did not, as the servant of J. S., and by his command, commit the trespasses, is bad on special demurrer, as involving a negative pregnant.

In trespass qu. cl. freg., the defendant pleaded specially, deducing title to the locus in quo, under an inclosure act, in J. S., and alleging that J. S. thereupon became and continued possessed thereof until just before the time when &c., and the defendant then justified the trespasses as the servant of J. S., and by his command. The plaintiff replied, that the defendant entered and committed the trespasses after the passing of the Limitation Act, 3 & 4 Will. 4, c. 27; that the entry was made to recover the close in which &c.; and that the right to make such entry did not first accrue to J. S., or to the defendant, or any person through whom J. S. or the defendant claimed, within twenty years next before such entry:—*Held* good, on special demurrer, and that it was not necessary to set forth the particular mode in which the estate of J. S., or the party through whom he claimed, had determined.

TRESPASS qu. cl. freg. Fourth plea, that the said close in which &c. was the close, soil, and freehold of one Thomas Holt, wherefore the defendants, as the servants of the said T. Holt, and by his command, at the several times wherein &c., committed the alleged trespasses. The fifth plea stated, in substance, that from time immemorial, and up to the passing of an act of Parliament for inclosing

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lands in the parish of Hope Mansell, in the county of Hereford, the said close in which &c. was parcel of certain waste and commonable lands within that manor; that certain tenements, called Sutton, Hazlebridge, Upper End, and Twisland, which last one Mary Jones had shortly before the passing of the said act purchased of W. E., were customary tenements of the said manor, and the owners and occupiers thereof were entitled to commonable rights in the said waste lands, &c. The plea then stated grants by the lord of the manor of the tenements called Sutton and Hazlebridge to one John Jones, to hold to him and his heirs, whereof he died so seised before the passing of the said act, viz. on the 1st August, 1790, leaving the said Mary Jones his widow, and John Jones the younger, his eldest son and heir-at-law. It then stated the admittance of Mary Jones to the tenements called Sutton and Hazlebridge, for her free bench, the residue thereof belonging to the said John Jones the younger as customary heir, and the admittance of I. Trusted to the tenement called Upper End, and of the plaintiff, Charles Jones, her son, to the tenement called Twisland, in trust respectively for Mary Jones, her heirs and assigns. The plea then set forth the material provisions of the inclosure act, which was passed in 1807, and stated that the close in which &c., with other land thereto adjoining, being parcel of the said waste lands, was allotted by the commissioner under the act to the said Mary Jones, in compensation for all rights and interests in the same in respect of the said several tenements; and that by a codicil to her will, dated in 1810, she appointed the said I. Trusted her trustee of such part of the said allotment as was allotted to her in right of the Upper End estate, to and for the use of George Jones, the defendant; that after her death, it was agreed by John Jones the younger, George Jones the defendant, and the plaintiff, to refer the division of the said allotment to an arbitrator, who awarded that the said G. Jones, his heirs, &c., or the said I. Trusted and his heirs, in trust for the said G. Jones, should stand seised of all that piece

of land, containing by admeasurement 25 acres and 30 perches, being a part of the said allotment so awarded to the said Mary Jones; and that the said close in which &c., in the declaration mentioned, was parcel of the said 25 acres and 30 perches of land, so awarded to the said I. Trusted in right of the said estate of Upper End. The plea then stated the death of I. Trusted, and that Thomas Trusted, his eldest son and heir, entered into the said close in which &c., and then became, and remained until *just before* the first of the said several times when &c., lawfully possessed of the same. The plea then gave express colour to the plaintiff, and justified the entry of the defendants, as servants of T. Trusted, and by his command &c.—Verification.

Replication to the fourth plea, that the defendants did not, as the servants of the said T. Holt, and by his command, commit the alleged trespasses in the declaration mentioned, modo et formâ.

Replication to the fifth plea, that the defendants entered upon the said close in which &c., and committed the trespasses &c. after the passing of a certain act of Parliament, [3 & 4 Will. 4, c. 27, the Limitation of Actions Act], and also after the 31st day of December, A.D. 1833; that such entry was so made for the purpose of recovering the said close in which &c., and that the said T. Trusted, by the defendants his servants, did then enter upon and take possession of the said close in which &c.; that the supposed right to make such entry did not first accrue to the said T. Trusted, or to the defendants as his servants, or to any person through whom the said T. Trusted, or the defendants, claim the estate and interest in the said close in which &c., within the true intent and meaning of the said act of Parliament, at any time within twenty years next before the making of such entry; and that by reason thereof, and of the said period of twenty years next before the making of such entry having fully expired before the making of the same, without such right of entry having first

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accrued as aforesaid at any time during the said last-mentioned period, the said supposed right of the said Thomas Trusted, and of the defendants as such servants, to make such entry, had been extinguished, according to the form &c. of the said act of Parliament, before and at the said times when &c.—Verification.

Special demurrer to the replication to the fourth plea, assigning for causes (amongst others), that the replication traverses both that the defendants committed the trespasses as the servants of the said T. Holt, and that they committed the same by his command; whereas one of those allegations would be sufficient to sustain the said plea; also for that the replication is a negative pregnant with this affirmative, that the defendants committed the trespasses as the servants of the said T. Holt, and that it is consistent therewith that they acted by his permission in so doing; also for that the replication puts in issue both whether the defendants had the authority of T. Holt for committing the trespasses, and that they committed the same under that authority, and is therein double.

Special demurrer to the replication to the fifth plea, assigning for causes (amongst others), that the replication alleges that T. Trusted entered upon the said close more than twenty years after his right to make such entry had accrued; whereas the plea states, that I. Trusted, of whom T. Trusted is eldest son and heir, died seised of the said close, and that thereupon the said close descended and came to the said T. Trusted, as such eldest son and heir; that the replication, if intended as an argumentative traverse of that allegation, should have concluded to the country; and that if intended as a plea in confession and avoidance thereof, it is wholly insufficient, in that it does not confess the said allegation, but is wholly inconsistent therewith.

Joinders in demurrer.

The case was argued in last Hilary Term (Jan. 27), by

Fortescue, in support of the demurrers.—The replication

to the fourth plea is bad, as containing a negative pregnant. It alleges that "the defendants did not, as the servants of T. Holt," commit the trespasses. This is a negative pregnant with an affirmative, which destroys its own tenor, namely, that they committed the trespasses as the servants of Holt. It is the very instance put in the books: see *Myn* v. *Cole* (*a*). It will perhaps be argued, that there is now no such thing as a negative pregnant. There is nothing, however, in any recent cases to repeal the law laid down on this subject in the old authorities. In *Bell* v. *Tuckett* (*b*), *Tindal*, C. J., certainly says, that "although formerly great weight seems to have been attached to that doctrine, it has not been much regarded of late." *Maule*, J., however, in his judgment in the same case, recognises and distinguishes the authorities there cited from Bac. Abr., Pleas and Pleading, I. (6). This issue would be proved for the defendants, if it were found by the jury that they were commanded by Holt to enter the close, but for other purposes. On the other hand, the issue might be found for the plaintiff, although *no* entry were proved, or even if it were found that the defendants did *not* enter. In the Year Book, 21 Hen. 6, f. 46, the case was thus:—"In trespass for cutting his trees, the defendant pleads that it was by command of the lessor, to give them to a stranger; the plaintiff replies, that he did not cut the trees *by his command;* this was held a negative pregnant, and that he should have pleaded ne commanda pas." That is precisely the present case. The replication ought to have been, that the defendants entered of their own wrong, and without the command, or absque residuo causæ.

The replication to the fifth plea is also bad for the cause assigned. Where title is shewn by the plea, the plaintiff must in his replication shew title in answer thereto; and it is not enough to aver that the defendant's right of entry did not accrue within twenty years before the alleged tres-

(*a*) Cro. Jac. 87. (*b*) 3 Man. & G. 802.

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pass, without shewing what was the title of the party under whom the defendant claimed, and how it was determined. This clearly appears from the stat. 3 & 4 Will. 4, c. 27, ss. 2 & 3. The replication follows, no doubt, the words of the second section, in stating that the supposed right to make such entry did not first accrue to T. Trusted, or to any person through whom he claims the estate, within the true intent and meaning of the act, at any time within twenty years next before the making of such entry. But then the 3rd section goes on to define *when* the title to make the entry shall be deemed to have first accrued; viz. "when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was received." Put the case of possessio fratris, mentioned in the 13th section. That section is altogether prospective, and could only affect the possession of a younger brother after the passing of the act: in such a case this replication would not raise the merits upon the statute; and if *any* case can be put in which it would not do so, the defendants are entitled to contend that it is bad on special demurrer. There is no difficulty in pleading in the manner suggested, because the statute points out the several events from which the twenty years are to be computed. At all events, this replication is not well pleaded; it might be true, and yet the defendants might be entitled under sect. 13; for it appears upon the pleadings that the plaintiff is the brother of the defendant Jones; therefore, if the legal title is in him, it is a case of possessio fratris, and so the time did not begin till the passing of the act. The replication states, indeed, that the entry of the defendants was after the pass-

ing of the act; but it should also have shewn, either that the possession was adverse at the time of the passing of the act, or that the entry was more than five years afterwards. The plaintiff ought to bring himself strictly within the statute. He should either deny the title alleged in the plea, or shew strictly another title by way of confession and avoidance.—He cited *Doe* d. *Evans* v. *Page* (*a*), and *Doe* d. *Jukes* v. *Sumner* (*b*).

Keating, contrà.—The replication to the fourth plea is good. It is not contended that there is now no such thing as a negative pregnant; it is, however, an objection very much discountenanced. Very little authority really belongs to the case of *Myn* v. *Cole*. That was trespass for entering into the plaintiff's house and taking his goods; the defendant pleaded, as to the entry, that the plaintiff's daughter licensed him, and that he entered by that license. The plaintiff replied, "quod non intravit per licentiam suam;" and after verdict for the plaintiff, the replication was actually held bad in arrest of judgment. That certainly would not be so held at the present day. And it seems a strange dictum, "that he ought to have traversed the entry by itself,"—that is, have traversed his own cause of action—"or the license by itself." In truth, this resolves itself into an objection on the ground of *ambiguity:* Stephen on Pleading, 419, 421; and if there were in this case anything really ambiguous in the traverse, it would no doubt be objectionable; but there is not. In *Bell* v. *Tuckett*, *Tindal*, C. J., says (*c*), "I think it will be found, that where a plea or replication has been objected to on the score of *duplicity*, and it has been held good on the ground that the matters relied on as shewing the plea to be double, amount but to one single ground of defence, an objection that the pleading involves a negative pregnant has never been supported." In *Pigeon* v. *Osborne* (*d*), in assumpsit

(*a*) 5 Q. B. 767.
(*b*) 14 M. & W. 49.
(*c*) 3 Man. & G. 802.
(*d*) 12 Ad. & E. 715.

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for goods sold, the defendant pleaded that the goods were, with the knowledge and consent of the plaintiffs, sold to the defendants by H., being the agent of the plaintiffs, in his own name, as the true owner: the plaintiff replied, that the goods were not, with the knowledge and consent of the plaintiffs, sold to the defendants by H. in his own name, as the true owner, in manner and form, &c.: and a demurrer to this replication, on the ground that the traverse was a negative pregnant, and ambiguous, was set aside as frivolous. [*Alderson*, B.—There it was all one proposition.] *Chambers* v. *Donaldson* (*a*) was the first case in which it was established that the command could be traversed at all, and there the traverse was exactly in this form, and was not objected to. It is fully established, that a number of facts may be pleaded as one defence, if they amount only to one entire proposition: *Bennison* v. *Thelwell* (*b*), *De Bernaldez* v. *Spalding* (*c*), *Robinson* v. *Raley* (*d*), 2 Saund. 319, b.

Secondly, as to the replication to the fifth plea.—The replication follows strictly the terms of the 2nd section of the Limitation Act; the effect of which statute is (by sect. 34) absolutely to extinguish the right at the end of the twenty years. [*Parke*, B.—Mr. *Fortescue* contends that you should go on and shew in what way the defendant's title ceased, as then the facts which are to be put in issue will be more clearly ascertained.] That is a matter more within the knowledge of the defendant, and he may plead by way of rejoinder any facts which prevent the operation of the statute. [*Parke*, B.—I do not see how.] If not, it will be open on a traverse of the allegation in the replication. How could a party entering at the end of the twenty years know the mode in which the adverse title was extinguished? With respect to the case of *Doe* d. *Evans* v. *Page*, it appears to be at variance with that of *Doe* d. *Bennett* v. *Turner* (*e*). But, at all events, it cannot be necessary for a party who relies

(*a*) 11 East, 65.
(*b*) 7 M. & W. 512.
(*c*) 4 Q. B. 823; Dav. & M. 43.
(*d*) 1 Burr. 316.
(*e*) 7 M. & W. 226.

upon the statute as a defence, to anticipate the facts whereby its operation is to be got rid of. If the defendant has been out of possession for twenty years, primâ facie his title is extinguished; and if there be circumstances to take him out of the operation of the statute, they should come from him. This form of pleading was adopted in *Holmes* v. *Newlands* (*a*), and no question was raised upon it. [*Alderson*, B.—In the case of the possessio fratris, to which Mr. *Fortescue* adverted, why could not the defendant take issue? If he be right, his title *has* accrued within twenty years. *Parke*, B.—Sect. 3 begins as a *constructive* clause; is not that as if the construction were put into sect. 2?] It is rather a declaratory clause of the *facts* whereby sect. 2 is to be proved; the very separation of the sections shews that the 3rd is merely for the purpose of interpreting the 2nd by way of *evidence*, the whole being still referable to the one period of twenty years mentioned in sect. 2.

Fortescue was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—On the argument of this case, we intimated our opinion, that if a new trial of the issues should be awarded, Mr. *Keating* should have liberty to amend. Having determined that the rule nisi for a new trial should be discharged, so that no amendment can now take place, we must give judgment on the demurrers.

To a declaration in trespass, there is a plea of liberum tenementum of T. Holt, and a justification of the trespasses by the defendants as his servants, and by his command. The replication to this plea is, that the defendants did not, as the servants of the said T. Holt, and by his command, commit the alleged trespasses. And there is a special demurrer to the replication, assigning various causes, amongst others, that the replication is a negative pregnant.

(*a*) 11 Ad. & E. 44.

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On the argument before us, it was contended that the doctrine of negative pregnant might now be considered as a dead letter, in accordance with the opinion of Lord Chief Justice *Tindal*, expressed in the case of *Bell* v. *Tuckett* (*a*), that "it has not been much regarded of late," and by reason of several decisions, where the objection has not prevailed; viz. that case, the case of *Pigeon* v. *Osborne* (*b*), and *Bennison* v. *Thelwell* (*c*). In those and many other cases, the Courts, following the doctrine laid down in that of *Robinson* v. *Raley* (*d*), and explained in *De Wolf* v. *Bevan* (*e*), have allowed several facts constituting one point of defence to be included in one traverse; and, in carrying into effect that very convenient doctrine, have not very strictly followed the rule which forbids a negative pregnant; but they certainly have not decided that the rule does not now prevail in any case; on the contrary, in the case of *Bell* v. *Tuckett* (*f*), my brother *Maule* says, that the doctrine does not apply to that case, where it was understood that the replication put the plaintiff on the proof of all the allegations comprised in the plea; and he distinguishes the cases of negative pregnant which were cited in the argument. The cases so distinguished very closely resemble the present, and appear to us to govern it. And in the case of *Michael* v. *Myers* (*g*), the Court of Common Pleas by no means treat the doctrine of negative pregnant as at an end.

A negative pregnant is objectionable on the ground of ambiguity. It is a form of negative expression, which "rather supposes an affirmative than the contrary;" and "every plea ought to contain a certain affirmation or negation of any single point in question" (*h*). Thus, Lord *Coke* says (*i*), "ne dona pas per le fait" is bad, because it implies

(*a*) 3 Man. & G. 802.
(*b*) 12 Ad. & E. 715.
(*c*) 7 M. & W. 512.
(*d*) 1 Burr. 316.
(*e*) 13 M. & W. 167.
(*f*) 3 Man. & G. 806.
(*g*) 6 Man. & G. 709.
(*h*) Co. Litt. 126. a.; Gilb. Hist. C. P. 153; Stephen on Pleading, 381.
(*i*) Co. Litt. 126. a.

a gift by parol, and is not a direct negative. The case in the Year Book, 26 Hen. 6, fol. 46, 47, and referred to in Bacon's Abridgment, Pleader, I. (6), and which was cited in the case of *Bell* v. *Tuckett*, was another instance. In waste, the plea was that the defendant cut down by the command of the predecessor of the plaintiff; a replication, that he did not cut the trees by his command, was held bad. Yelverton says, "it ought to have been that the predecessor did not command." In *Myn* v. *Cole* (*a*), a replication to a plea justifying under the license of the plaintiff's daughter, traversing that he entered per licentiam suam, was held bad as a negative pregnant. This traverse might, as Mr. Serjt. *Stephen* observes, (and the same remarks apply to the case in the Year Book), imply that a license was given, though the defendant did not enter by it; it is, therefore, pregnant with the admission that the license was given, and yet it is not expressly admitted, and it is in doubt whether the plaintiff means to deny the license, or the entry by virtue of it. There is also the case of *Auberie* v. *James* (*b*), where the replication of "non moderate castigavit" was held bad on a similar ground.

In the present case, the replication is clearly open to the same objection. It implies an admission that there was a command, and yet does not expressly admit it, and leaves it uncertain what the question is. Further, it would be true if the defendants did not enter at all, and therefore would be a denial of the very fact which both parties previously admitted. We must, therefore, hold it to be ill pleaded, unless we are prepared to say that the rule, that every traverse shall be unambiguous, and not contain a negative pregnant, is exploded, which we certainly are not authorised to say. In this replication the plaintiff should have pursued the ordinary form; he should have replied, admitting the lib. ten., de injuriâ absque residuo causæ, or generally that the

(*a*) Cro. Jac. 87. (*b*) Ventr. 70.

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defendants committed the trespasses de injuriâ, and without the command of Holt. We therefore think our judgment should be for the defendants on the demurrer to this replication.

We have now to dispose of the demurrer to the replication to the fifth plea. This plea deduces a title by an inclosure act to an allotment of copyhold land, comprising the locus in quo, to one Trusted, as a trustee for the defendant Jones; it states his entry and possession until just before the time of the trespasses, then gives express colour to the plaintiff, and states his possession at the time of the trespasses under a charter of demise without livery, and the defendants justify the trespasses complained of as the servants of T. Trusted, and by his command. To this plea there is a replication, that the defendants entered and committed the trespasses after the passing of the Limitation Act, and after the 31st December, 1833; and it avers, that the entry was made for the purpose of recovering the close in which &c., and that the supposed right to enter did not first accrue to Trusted, or the defendants, or any person through whom they claimed the estate and interest in the close, at any time within twenty years before making that entry, and that by reason thereof the supposed right of Trusted, and the defendants as his servants, was extinguished. To this replication there is a demurrer, assigning various causes, and raising a question of considerable importance. That question is, whether the plaintiff, who is admitted to be in possession, and who seeks to displace the title under which the defendants claim, on the ground that it is barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, must shew what that title was, and how it was barred; the statute providing that the twenty years should run from different dates, according to the nature of the title and the character of the party in possession at the commencement of the twenty years.

That the plaintiff, the party in possession, need not shew

title in *himself* seems to us to be clear. His case is, that the estate under which the defendants claim has been extinguished, and consequently his own possession, whatever it is, cannot be disturbed. He is not in the situation of a plaintiff admitting the freehold still to be in the defendant, for such a plaintiff must shew what estate he claims under him in his replication, as a term of years, or the like. If this were a plea of lib. ten. in the ordinary form, *at the time of the trespass*, the traverse of the averment of freehold would have raised the question, whether it had been extinguished *at that* time by the lapse of the twenty years. But the form of this plea, stating the conveyance of the estate, and deducing it to Trusted, prevents that course; the estate must be shewn, by pleading on the plaintiff's side, to have ceased. Is it enough, then, to aver that twenty years have elapsed since the title accrued, so as to bring the case within the 2nd section, which gives the rule, or must the special facts be stated, to bring it within the other sections? As the fact, whether the time has elapsed or not, lies more within the defendants' knowledge than the plaintiff's, who is merely in possession, and may have been so for a day only, and does not necessarily claim under one who had been in possession before, we think that the general allegation, so as to bring the case within the 2nd section, is sufficient.

The defendants will, on that issue, have to prove, that they entered within the time limited, by shewing that Trusted was dispossessed or discontinued his possession within twenty years before, or otherwise bringing himself within the provisions of the act. It is observable, that the plea states possession by Trusted *just* before the time when &c., but not that it was within twenty years before the subsequent entry by the plaintiff. The averment, in its present form, is immaterial; the plea would have been good without it, and it may therefore be altogether rejected in considering whether the replication is good. It was, however, contended by Mr. *Fortescue*, in his able argument, that it is not enough

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for the plaintiff to allege that the entry was not within twenty years after his title accrued, because the case might be one in which that averment would be true, and yet the defendant would be entitled to enter. If, for instance, the land had been in the possession of a younger brother, the defendant Jones being the heir, such possession, he argued, if the *entry* be after the act, would not be the possession of the person entitled, but before the act it would. If, then, a brother had been in possession during more than twenty years before the act, though the heir's right of entry would have accrued more than twenty years ago, (for during the whole of such possession he would have a right of *entry*), he certainly might not be barred. The same observation might be made, if, for twenty years before the act, the lands had been occupied by tenants at will. The answer to this argument is, that the lapse of twenty years would, by the express enactment of the 2nd section, be a bar; but if the possession of the brother, or the tenancy at will, continued at the time of the passing of the act, the 15th section provides a remedy, as the possession would not be adverse, and the entry must take place within five years after the passing of the act. But if the defendant wished to avail himself of the right of entry under this clause, he ought to plead it in a rejoinder, for the clause is by way of a proviso or defeasance on the prior clause, and by the rules of pleading, ought to come from the party seeking to avail himself of it.

If the possession of the brother or the tenant at will had ceased at the time of the passing of the act, though for a short time, and some one else had got into possession, the possession was then adverse, and the 15th section would not apply. Whether the defendant Jones's title would in that case have been totally barred, is a question. If it would, it would be on the ground that it fell within the enactment of the 2nd section, limiting the twenty years after the title first accrued, and not within the proviso in the 15th, and so

the replication would be supported. If it would not, and assuredly every endeavour should be made to construe the act so as to avoid such a consequence, it would be by holding that the title did not first accrue till the end of the occupation by the brother, or of the tenancy at will, and if so, the replication would equally be sustained.

For these reasons, we think the replication sufficient; and therefore the judgment of the Court must be for the plaintiff on the demurrer to the fifth plea.

Judgment accordingly.

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April 16.

Where it is the regular course of proceeding of an inferior Court, on a verdict being found therein, for the judges of the Court to issue execution for the debt in case of non-payment, and levy the amount, the fact of the plaintiff's bringing his plaint in the inferior Court, and not countermanding the execution, renders him liable in trespass for the seizure, unless he justify under the process of the inferior Court.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods. Plea, not guilty, by statute (*a*). At the trial, before *Coltman*, J., at the last Chester assizes, it appeared in evidence that the defendant had sued the plaintiff in the hundred court of Nantwich, in that county, for an alleged debt of 1*l.* 19*s.* The plaintiff was duly summoned to appear to answer the plaint in the inferior Court, but failed to do so, and thereupon, according to the practice of that Court, as sworn to by the steward, a verdict passed against him for the debt and costs. It appeared that it was the regular practice of the Court for the steward, without any application from the party obtaining the verdict, to issue a distringas, in case of non-payment within a reasonable time, under which the goods of the debtor were seized and sold to satisfy the debt and costs. Accordingly, the present plaintiff not having,

(*a*) No statute was referred to which protected the defendant; the case stood, therefore, as upon the ordinary plea of not guilty.

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within the usual time allowed for that purpose paid the money, the steward, in due course, without any application from the present defendant or his attorney, issued a distringas in regular form, under which one of the bailiffs of the Court entered the plaintiff's house, and distrained the goods in question, which were sold to satisfy the defendant's debt, and the proceeds were paid over to the steward. The defendant was not present at the seizure, but it was proved that he had stated to the bailiff, a few days afterwards, that he had got his money from Coomer.

It was contended for the defendant, that, under these circumstances, he was not liable in trespass for the act of the officer of the inferior Court. The learned judge thought that there was evidence, by the defendant's subsequent declaration, of his having authorised the seizure, and under his direction the jury found a verdict for the plaintiff, damages 4*l.* 9*s.*, leave being reserved to the defendant to move to enter a nonsuit.

Welsby now moved accordingly.—There was no evidence to go to the jury that the defendant authorised the officer to commit the trespass. The defendant in no way personally interfered in the levy; the distringas was not sued out by him, or issued at his instance, but was the act of the Court; and the mere statement of the defendant, that he had got his money from the debtor, by no means imports that he knew it had been obtained by seizure of his goods. Under these circumstances, *Carratt* v. *Morley* (*a*) is an authority to shew that the present defendant, the plaintiff in the inferior Court, who merely was a suitor for the recovery of his debt according to the practice of the Court, is not liable in trespass. [*Parke*, B.—In that case the proceedings of the inferior Court were irregular.] The judgment does not appear to proceed on that ground.

(*a*) 1 Q. B. 18.

PARKE, B.—I am of opinion that there ought to be no rule in this case. The question is, whether there is evidence to go to the jury of the defendant's having authorised the issuing of the distringas. If, as appears to be the case here, it is the usual and regular practice of the inferior Court, upon a verdict for the plaintiff, for the judge of the Court to go on in the regular course, and issue a distringas, then, unless the plaintiff countermands it, he, by bringing his plaint in that Court, impliedly authorises the issuing of the distringas, and is just as liable as if he had expressly directed the officer to serve it. The case of *Carratt* v. *Morley* is quite distinguishable: there the inferior Court had adjudicated against a party who was not liable; and the Court held, that a person who merely originated a suit in a court of justice, by stating his complaint there, was not liable in trespass where the proceedings of the Court were erroneous or without jurisdiction. But in this case everything was lawfully done, and the defendant would not have been liable as a trespasser if he had pleaded properly. The fact of the entry and seizure of the goods being proved, the issue on the plea of not guilty must have been found for the plaintiff, but the defendant would have had a complete defence if he had justified under the process of the inferior Court. There is, moreover, the circumstance of the defendant's saying that he had got the money from the plaintiff.

ROLFE, B.—If that which the defendant did led inevitably, in the due and regular course of proceeding, to the issuing of the distringas, it is the same as if he had directly authorised its issuing, and then he was bound to shew his justification for doing so.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused.

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April 21.

SPRY, Clerk, *v.* GALLOP.

Upon a special case stated as to the right of the plaintiff, as rector of the parish of St. Marylebone, and minister of the new church of that parish, to recover certain fees alleged to be due for the burial of certain paupers in the new burial-ground of the parish, it appeared that, in 1733, the then minister or rector of the parish, and the parochial authorities, referred to a third person the settlement of the minister's fees, and a table of fees was accordingly prepared by the referee.

DEBT by the plaintiff, who is the rector of the parish of St. Marylebone, and the minister of the new church of that parish, to recover from the defendant the amount of certain fees, alleged to be due to the plaintiff in respect of the burial of certain paupers of that parish. Plea, nunquam indebitatus.

The following case was, by consent of the parties and under the order of a judge, stated for the opinion of this Court. The plaintiff, the Rev. Dr. Spry, became in 1825, and still is, rector of the parish of St. Marylebone, in the county of Middlesex, and minister of the new church of that parish, mentioned in the acts of Parliament hereinafter referred to. Several acts of Parliament for the building of churches and chapels in that parish, and for the creation of a select vestry therein, have been passed, and upon the construction of the act hereinafter mentioned the present question arises. By the statute 51 Geo. 3, c. 151, intituled, "An Act to enable the Vestrymen of the Parish of St. Marylebone, in the county of Middlesex, to build a new

From that time down to 1838, a fee of 1*s.* 6*d.* was paid by the parish officers to the minister or rector of the parish for the burial of a pauper in any of the cemeteries of the parish. By the stat. 51 Geo. 3, c. 151, (A.D. 1811), the vestrymen of St. Marylebone were empowered to purchase land for erecting a new church and new chapels, and making a new burial-ground. By sect. 35, Dr. H., the then rector, and his successors, were declared to be ministers of the new church, and the patron of the living was empowered to appoint successively ministers of the new church, who were to enjoy such oblations, mortuaries, glebes, tithes, profits, and other ecclesiastical dues, as the present minister ought to have. Power was also given to the patron to appoint a minister to officiate in burying the dead in the new burial-ground, but no person was appointed in pursuance thereof. By sect. 49, the vestrymen were empowered to settle the rates and fees for burial in the new burial-ground, and to alter and amend the same. By sect. 50, they were prohibited from reducing the burial fees below the amount then payable for burials in the parish. By sect. 71 they were empowered to borrow £150,000 on the credit of the rates and burial fees, and to assign any portion of such rates or fees to the persons advancing the money. In pursuance of the act, the vestry, in 1835, settled a table of fees, of which an item was, "Paupers from the workhouse, 2*s.* 6*d.*;" and from that time the sum of 1*s.* 6*d.* has been paid to the rector, and 1*s.* to the clerk and sexton, on such burials. The burial service has not been performed by the rector or any of his curates, but by the reader of one of the new chapels.

Held, first, that, upon this statement, no fee was shewn to be due to the plaintiff, either by custom or by virtue of the act of Parliament; secondly, that, if such fee were due, it must be recovered in the Ecclesiastical Court.

Parish Church, and two or more Chapels," &c., after reciting, with other statutes, the statute 46 Geo. 3, c. 124, to enable the vestrymen of the parish of St. Marylebone to provide any additional cemetery or burial-ground for the parish, and to erect a chapel thereon, &c., and reciting that the said vestrymen had purchased a piece of ground and inclosed the same for an additional cemetery for the said parish, and erecting a chapel thereon, but that the said piece of ground had not then been consecrated, nor had any church or chapel been erected or built thereon, it was enacted, that the said recited acts be repealed, and by the next section (2) it was enacted, that the vestrymen appointed under 35 Geo. 3, c. 73, be empowered to carry that present act into execution. By sect. 14, the said vestry are empowered to purchase land within the said parish, for erecting a new parish church, and also two or more chapels, and for making any roads or approaches to the same, or to the cemeteries, and also for providing buildings, &c., for the residence of a clergyman, clerk, and sexton, in the said cemetery. By sect. 26, the vestrymen are empowered to enter into any contract for building, repairing, &c. the said church, chapels, &c., and the said piece of ground so purchased and intended for a cemetery, and for erecting a chapel thereon, &c. By sect. 29, it is enacted, that the said piece of ground so purchased in pursuance of 46 Geo. 3, c. 124, for a cemetery, and for erecting a chapel, should be vested in the said vestrymen, subject to the provisions of this act. By sect. 31, vestrymen are empowered to build a chapel upon the said piece of ground so purchased for a burial-ground, and also to build a house thereon for the residence of the minister, to be appointed as thereinafter mentioned, for burying the dead in the said cemetery, and another house for the use of the clerk or sexton. By sect. 33, so soon as the piece of ground for a cemetery shall have been consecrated, the same shall for ever be used as an additional cemetery.

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By sect. 35, Dr. Hislop, (the then minister of the said parish), and his successors, were declared to be ministers of the said new church; and the Duke of Portland, (then the patron of the living), and his successors, were empowered, upon every vacancy, to appoint a fit person to be minister of the said new church, which person and persons, and his and their successors, so to be nominated and appointed, should, after such nomination, be ministers successively of such new church, and should have and enjoy such oblations, mortuaries, Easter offerings, glebes, tithes, profits, commodities, and other ecclesiastical dues and duties, arising within the said parish, as the present minister ought to have and enjoy, or that any of his predecessors (ministers of the said parish) ought to have had and enjoyed. By sect. 41, it is enacted, that when the said piece of ground so purchased for a cemetery, or for erecting a chapel, should be consecrated, the said Duke of Portland, or the persons for the time being entitled, should from time to time appoint a minister of the Church of England, to officiate for life, or during pleasure, in burying the dead in the said intended cemetery; and also, that when the said chapel should be finished and consecrated, the said Duke of Portland, or the other persons entitled, should appoint a reader to perform divine service in the said chapel; and the said Duke of Portland, &c. were thereby empowered to appoint a clerk and sexton, with the consent and approbation of the said vestrymen; and that the said reader, preacher, clerk, and sexton, should receive for their respective salaries such sums of money yearly as the said vestrymen should think fit to appoint. By sect. 46, the minister of the other chapels to be built is to receive such salary as such vestrymen shall think fit to appoint. By sect. 49, the said vestrymen are empowered to settle the rates and fees for burial of the dead in the vaults of the said new church, and of all the chapels to be built on and in the intended cemetery, and in the vaults, and to make such

rules concerning burials, and for keeping the said new church, chapels, and vaults in good repair, and to alter and amend such rates and fees, and to make such other rates, &c. as should to them appear reasonable. By sect. 50, it is provided, that nothing in that act should enable the vestrymen to reduce the rates or fees to be payable for every burial in the said vaults and cemetery, to less sums than were then payable, according to the classes or divisions of the said vaults and cemetery, for burials in the then present cemeteries of the said parish; but the same should be due and payable to, and might be demanded and taken by, the persons entitled thereto, anything therein contained to the contrary notwithstanding. By sect. 52, the vestry are empowered to let the pews in the said new church and chapels, and to receive the pew rents. By sect. 61, the vestrymen are empowered to make rates for the purposes of the act, not to exceed 4*d.* in the pound. By sect. 71, it is enacted, that, in order to enable the said vestrymen to carry the several purposes of this act into immediate execution, it shall and may be lawful for them, from time to time, to borrow at interest such sums of money, not exceeding in the whole £150,000 at any one time, as they shall judge necessary for the purposes of the act, upon the credit of the rates and fees arising on account of burials in the said new church or chapels, and in the said cemetery, and also on the rates and fees arising on account of burials in any other cemetery, burial-ground, or vault, within the said parish, and on the sums of money received for the rents of pews in the said new church and chapels, and upon the credit of the rates or assessments levied and collected by virtue of this act; and by writing to assign all or any part of the said fees, costs, rates, or assessments, to such persons as shall lend or advance any money thereon. By sect. 72, the said vestry are empowered to raise money by annuities. By sect. 78, it is enacted, that all monies arising from such fees, rents, rates, or assessments, and all money that might be borrowed by the said vestrymen by virtue of

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that act, should be applied towards carrying the several purposes of that act into execution. By sect. 80, it is enacted, that if at any time hereafter all the money which shall have been borrowed by virtue of this act shall be paid off and discharged, and the monies arising from the rents of the pews in the said intended church and chapels, and the rates and fees received on account of burials within the several cemeteries, burial-grounds, and vaults, within the said parish, and from the rates or assessments to be raised, levied, and collected, by virtue of this act, shall be more than sufficient for paying the several annuities and annual sums of money to be paid by way of tontine, and the several other annual sums and salaries to be paid by this act, and the repairs of the said intended new church and chapels, and other buildings and conveniences to be erected, purchased, or taken, by virtue thereof, and all the costs attending the execution of the same, then it shall and may be lawful for the said vestrymen to apply such surplus monies to such parochial purposes as the said vestrymen shall think right and proper, and as shall in their judgment be for the use and benefit of the parishioners of the said parish, and all such rates and assessments on lands, tenements, or hereditaments, shall thenceforth cease and be no longer raised. By sect. 89, it is provided, that nothing therein contained shall operate to lessen or alter the right of the Duke of Portland, or the person for the time being entitled to the said rectory or advowson, to the ecclesiastical dues, oblations, &c., belonging thereto.

On the piece of ground stated to have been purchased for a burial-ground in the preamble of the statute 51 Geo. 3, the vestrymen of the said parish, in or about the year 1814, built a chapel, under the provisions of the said act, and the rest of the ground was converted into a cemetery, under the provisions of the same act, and that ground was duly consecrated as a burial-ground in the month of May, 1814. The chapel is named St. John's Chapel, Marylebone, and the cemetery is called the burial-

ground of St. John's Chapel. It appears by the parish books, that before the passing of that act, so far back as the year 1733, the surplice fees for the burials in the said parish were received and paid to the minister of the said parish, for his own use, and were one of the profits of that living; and a fee has, since the passing of the said act, been paid to the rector, for all burials in the cemetery of the said parish, except in regard to the pauper burials, as to which an objection was taken in June, 1838, to the payment of any fee to the rector. Under the provisions of the said act, the vestry settled the amount to be received as fees payable for the burials of the dead in the vaults of the parish church and chapels, and in the cemetery; and the fees for all burials in the said ground, called the burial-ground of St. John's Chapel, have been received by the plaintiff and his predecessors, ministers of the parish, respectively, since the consecration of the said burial-ground, without any claim or objection except as herein mentioned.

In the year 1733, it was by the vestry, on the part of the parish, and by Mr. Garwood, the then minister of the parish, on his own part, referred to Major Hanway to settle the minister's fees, and the fees of the parish clerk, and sexton, and grave-digger, for burials in the church, churchyard, and new burying-ground, and it was resolved that his determination in writing should be final and decisive. In pursuance of this reference, Major Hanway prepared a table of fees, which was signed by him at a special vestry called for that purpose, and was afterwards, at the same vestry, signed by Mr. Garwood, and the churchwardens and inhabitants present. Such table of fees was afterwards, in pursuance of a resolution of the vestry, submitted to the Earl and Countess of Oxford, as patrons of the said living, and approved of by them, and was subsequently confirmed, at the instance of the vestry, by a faculty of the Diocesan Court of London. This table of fees was, by order of the vestry, afterwards entered in the minute-book of their proceedings,

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and printed for general use. These proceedings appear in the minutes of the vestry, and of a committee appointed by the vestry to consider the inclosing and fencing of the new burial-ground. Extracts from the said minutes of the vestry, and of the said committee, and a copy of such table of fees, are hereto annexed, and are to be taken as part of this case.

The accounts of the overseers of the poor of the said parish are in existence, for the year ending the 4th of May, 1683, and for the year ending Easter, 1688, and from the year 1730 to the present time. In the accounts of the overseers for the years 1683 and 1688, and in the accounts of the overseers for each of the years 1730, 1731, and 1732, there are charges for coffins, and digging graves for the poor, and for carrying the bodies of the poor to the grave. The earliest payments to the rector are the following items, that is to say, in the account of Mr. E. Dawsal, one of the then overseers of the parish, of disbursements for the poor in the year 1732, is contained the following entry:—"June 11. Mr. Garwood, as per order, £28." The next entry is the account of disbursements for the year 1783, by Mr. J. Coppendale, one of the overseers of the parish, as follows:—"May 27. Paid Mr. Garwood his fees for burying the casual poor, 1*l.* 10*s.*" And in the same year, in the account of disbursements of Mr. W. Boozshers, the other overseer, is the following:—"May 27. Paid Mr. Garwood, for the burial of twenty-nine poor persons, 2*l.* 3*s.* 6*d.*" From the year 1733, down to the fifteenth year of the reign of George the Third, the churchwardens and overseers of the poor of the said parish paid to the rector of the parish a fee of 1*s.* 6*d.*, out of the poor's rate of the parish, for the burial, in any of the cemeteries of the parish, of any pauper from the workhouse; and from the fifteenth year of the reign of George the Third, down to the year 1838, the directors and guardians of the poor of the parish continued to pay the rector of the parish, out of the poor's rate of the parish, a similar fee of 1*s.* 6*d.*, upon the burial, in any of

the cemeteries of the parish, of any pauper from the workhouse; but in the year 1838, the directors and guardians of the poor of the parish objected and refused to pay any fee to the rector, upon the burial of paupers from the workhouse in the St. John's Wood burial-ground aforesaid, of which the plaintiff in the same year had notice; and no fee since that time has been paid to the rector, upon the burial of a pauper in the said burial-ground.

In pursuance of the above statute of 51 Geo. 3, c. 151, a table of fees was, in February, 1835, settled by the vestrymen of the parish, in which table is an item as follows:—"Paupers from the workhouse, 2*s.* 6*d.*" Of such fee of 2*s.* 6*d.*, the sum of 1*s.* 6*d.* has always been paid to the rector, and 1*s.* to the parish clerk and sexton; and a payment of 1*s.* to the parish clerk and sexton, upon every burial from the workhouse, has been continued to be paid from the month of June, 1838, to the present time. A copy of the said last-mentioned table of fees is annexed to, and is to form part of, this case. The defendant, at the time of giving the orders hereinafter mentioned, was master of the workhouse, and as such, since the year 1838, gave orders to Mr. Tookey, the deputy clerk and sexton of the said parish, for the burial of ten paupers, who died in the workhouse, and who were buried in the cemetery of the parish, called the burial-ground of St. John's, being the new burial-ground above mentioned, one of which notices was in the following words:—"Parish of St. Marylebone. January 31, 1838. Let Isabella Harvey, charwoman, aged seventy-three years, be buried at the charge of the parish. George Gallop. To Mr. Tookey, St. Marylebone, High-Street." The other notices are substantially the same. On receiving such orders, Mr. Tookey gave notice that such funerals would take place, to Mr. Wharton, who had been duly appointed under the 41st sect. of the said act of 51 Geo. 3, c. 151, as rector, to perform divine service and preach in the said chapel, and he accordingly attended and

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buried the said paupers in the said ground. No person has been appointed under the 41st sect. of 51 Geo. 3, c. 151, to bury the dead in St. John's Wood burial-ground, nor did the plaintiff, or any of his curates, or any person appointed by the plaintiff, officiate at any of the said burials; but the plaintiff contends, that the said Mr. Wharton must be taken to have acted as his curate, or under his authority, for that purpose; and the plaintiff claims a fee of 1*s.* 6*d.* for each of such funerals.

It is to be taken for the purposes of this case, that the defendant is the party liable for such fees, if the plaintiff be entitled to be paid fees for the burial of paupers in the said last-mentioned burial-ground. The pleadings, of which a copy is annexed, are to form and be considered part of this case. The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover, by action in one of the superior courts of law at Westminster, a fee of 1*s.* 6*d.* for each of the said burials in the burial-ground of St. John's Chapel. If he is so entitled, a judgment shall be entered against the defendant in this action, by confession, for £ , immediately after the decision of this case, or otherwise, as the Court may think fit. But if the Court is of opinion that he is not entitled to recover such fee by an action in one of the superior courts of law at Westminster, then the plaintiff agrees to enter a nolle prosequi in this action, immediately after the decision of this case, or otherwise, as the Court may think fit, and that judgment shall be entered accordingly.

The plaintiff's points for argument were, that he is, under the circumstances above detailed, entitled to the fee of 1*s.* 6*d.* for each of the said burials mentioned in the case, and that such fee is recoverable by action at law. The defendant's points were, that a fee is not legally payable on the burials mentioned in the case; that if the same is payable, the plaintiff is not entitled to receive the same; and that such fee is not recoverable by action at law.

The case was argued in Hilary Term last (Jan. 18), by

Watson, for the plaintiff.—The first question in this case is, whether the plaintiff, as rector of the parish and minister of the new church, is entitled to the fees in question; and it is submitted that he is. It may be conceded that the burial fee is not due of common right, but only by custom. But this appears upon the case to be a customary fee. The minister, in such case, is not entitled to it as for the work he performs, but by way of pious offering; and where there is a chapel of ease, he is entitled to the fee though he does not himself officiate. The first trace of any burial fees being payable in this parish, which appears in the case, is in the year 1733, when a piece of land was purchased for a new burial-ground, and it was referred to a Major Hanway to *settle* the amount of the burial fees, and he did accordingly settle the fees payable in the new as well as the old burial-ground. The fees were then *settled* in amount, not *created* for the first time; the minister would not then, any more than now, have been entitled, except by custom. From that time down to the passing of the stat. 51 Geo. 3, c. 151, the fees mentioned in the case continued to be paid; being of two kinds, the one payable to the parish, the other the "surplice fee." The object of that act was to enable the vestrymen of St. Marylebone to build a new parish church, and two or more chapels, on ground to be purchased under the act. The important section to be considered in the present case is the 35th. It declares and enacts, that Dr. Hislop shall be the minister of the said new church; and that the Duke of Portland, then the patron of the living, or the person or persons for the time being entitled to the rectory of the said parish, and to the advowson of the said church of the said parish, and having the right of nominating and appointing a minister or ministers to the said old church, should and might, upon every vacancy, appoint a fit person to be the minister of the said new church,

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which person or persons, and his and their successors, so to be nominated and appointed, should, after such nomination and appointment, be ministers successively of such new church, and should have and enjoy such *oblations, mortuaries,* Easter offerings, glebes, tithes, profits, commodities, and other ecclesiastical dues and duties, arising within the said parish, as the present minister ought to have and enjoy, or as any of his predecessors, ministers of the said parish, ought to have had and enjoyed. Then, by sect. 49, the vestrymen are empowered to settle and fix the rates and fees for burial of the dead in the new church, &c.; but sect. 50 precludes them from reducing the fees to less sums than were then payable, and enacts, that "the same shall be due and payable to, and may be demanded and taken by, the person or persons entitled thereto, anything therein contained to the contrary thereof notwithstanding." It appears that, in pursuance of this statute, the vestry did settle a table of fees, of which one item is, "Paupers from the workhouse, 2*s.* 6*d.*," and that of this sum, 1*s.* 6*d.* has always been paid to the rector. The act of Parliament, therefore, distinctly recognises the existence and legality of the fees then payable. The 41st sect. of the same act directs, that when the piece of ground purchased for a cemetery or burial-ground for the parish shall be consecrated, the patron shall, from time to time, appoint a clergyman to officiate in burying the dead there. No person has been appointed under this section to bury the dead; but Mr. Wharton is the person appointed, under the same section, to perform divine service and preach in the chapel erected on the new burial-ground, and he accordingly officiated at the burials in question. Such being the state of the facts, the plaintiff is entitled to receive the fees on those burials. The case is, in truth, almost decided by that of *Spry* v. *Emperor* (*a*); the only difference being, that the fees demanded in that

(*a*) 6 M. & W. 639.

case were not fees for *pauper* burials, which can make no real difference.—On this part of the case, he cited 3 Burn's Eccl. Law, tit. "Offering," p. 453; Rogers's Eccl. Law, 125—128; Gibson's Codex, (2nd edit.), 542, 543; *Topsall* v. *Ferrers* (*a*); *Andrews* v. *Cawthorne* (*b*); and *Gilbert* v. *Buzzard* (*c*).

The next question is, whether, assuming the plaintiff to be entitled to these fees, an action at law will lie for them. First, he may recover them by action, if they are *customable* fees, and it makes no difference that they are spiritual fees: Year Book, 11 Hen. 7, p. 14, pl. 8. It is by no means clear that debt would not lie for a modus decimandi. But, in the next place, these fees being made payable by act of Parliament, the plaintiff is clearly entitled to recover them in a court of law. And for this purpose it is quite immaterial whether the person entitled to the fee be a spiritual person or not. When this case came before the Ecclesiastical Court (*d*), the judge, Dr. *Lushington*, held that he had no jurisdiction. In Vin. Abr., tit. Fees, H. pl. 7, it is stated, that a prohibition was granted to stay an action commenced by a parish clerk in the Consistory Court for his fees; on the ground that, as his office was temporal, whatever was given for the service of that office must be of temporal conusance. The general principle, that debt lies for fees or payments authorised by an act of Parliament, is laid down in Com. Dig., Debt., (A. 1), *Goody* v. *Penny* (*e*), and *Carden* v. *The General Cemetery Company* (*f*).

Martin, for the defendant.—Burial fees are of two kinds; the fee payable for the use of the ground for the grave, and that payable for the performance of divine service at the burial, commonly called the "surplice fee." It is the latter fee which is now claimed by the plaintiff. Now it is clear

(*a*) Hob. 175.
(*b*) Willes, 536.
(*c*) 2 Hagg. Cons. Rep. 233; 2 Phill. Eccl. Rep. 360.
(*d*) *Spry* v. *The Directors, &c., of St. Marylebone*, 2 Curteis, 14.
(*e*) 9 M. & W. 687.
(*f*) 5 Bing. N. C. 253.

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that such a fee is not due of common right, but only by custom, and for the performance of the service: Com. Dig., Cemetery, (B.), *Andrews* v. *Cawthorne, Dean of Exeter's case* (*a*), *Topsall* v. *Ferrers, Burdeaux* v. *Lancaster* (*b*). Now there is no evidence to satisfy the Court of any immemorial custom in the present case. To be good in law, it must have existed from the time of Richard the First; whereas here it is admitted that the first trace of any such fee is in the year 1733. This Court has no power to draw inferences of fact, as a jury might; a clear prescriptive title, therefore, ought to have been shewn upon the face of the case. Then, with respect to the supposed title founded upon the 51 Geo. 3, c. 151, it is plain upon the terms of that statute, that the burial fees for interment at the new burial-ground were intended to be payable to the new burial minister, to be appointed under the 41st section, and not to the minister of the new church; but no burial minister has been appointed, and neither the plaintiff nor his curates have in fact officiated at funerals there. As to the 49th section, that clearly was framed and intended only to protect the mortgagees, and applies, as was admitted in *Spry* v. *Emperor*, only to the fees to be taken in respect of the burial-place itself, and not to the surplice fees to be taken by the minister. In that case Lord *Abinger*, C. B., intimates his opinion distinctly, that those fees are receivable only by custom. And *Rolfe*, B., founds his opinion altogether upon the ground that the facts appearing in that case did amount in effect to what was contended for on behalf of the plaintiff, namely, that this had been a customary fee, payable under the name of a surplice fee, to the incumbent for the time being of the parish, *by himself or his deputy* performing the duty of burial. Upon the new facts appearing in the present case, the judgment of that learned judge in *Spry* v. *Emperor* is strongly in favour of the defendant. And it is to be remembered, that that was not an action for the fee

(*a*) 1 Salk. 334. (*b*) Id. 332.

tself, as this is, but an action against the receiver into whose hands it had been paid.

Secondly, with respect to the remedy. The authority cited from the Year Book, 11 Hen. 7, does not apply; there the thing could not have been recovered in the Ecclesiastical Court. This act of Parliament leaves the fees to be recovered in the proper Court; but there is no instance to be found of a mortuary or burial fee being recovered in a court of law, or indeed in any court. No doubt, where a sum of money is expressly made payable by statute, an action of debt founded upon the statute is maintainable for it; but that is not the present case. This fee, if recoverable at all, would properly be sued for in a spiritual court. It is not a thing of a temporal nature at all.

Watson, in reply.—The effect of this act of Parliament is to declare the rector entitled to all the fees which by usage were then payable to him. It has reference, not to a custom in the strict legal sense of the term, but to *long established usage*.—He cited *Rex* v. *St. James, Westminster* (*a*), *Campbell* v. *Maund* (*b*), and *King* v. *Hall* (*c*).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—[After stating the facts, he continued]: —Upon this case, the question submitted to us is, whether the plaintiff is entitled to recover, by action in one of the superior courts of common law, a fee of 1*s.* 6*d.* for each of the burials of paupers in the burying-ground of St. John's Chapel, against the defendant, who was the master of the workhouse, and who was, by the agreement of the parties, liable to pay the fees for each burial, if the plaintiff was entitled to be paid them. We think he is not.

In the former case in which the right to these burial fees

(*a*) 5 Ad. & Ell. 391. (*b*) Id. 865. (*c*) 1 B. & Cr. 123.

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was in question, (*Spry* v. *Emperor* (*a*)), the action was brought for money had and received against the receiver, to whom the fees then in question had been paid, and this Court, on the argument of the special case, thought that there was a sufficient statement of the fact of fees being due by custom, as against the party who had received them, and considered that the question was, not whether the fee was due by law or custom, but whether, having been actually received, it should be paid to one of two claimants or the other. The present question is very different; here the fee has never been received, and the plaintiff must prove his right to compel the defendant to pay it.

It is perfectly well settled, that such a fee, being for the performance of the burial service, is not due by common right, and can be legally due only by immemorial custom of the particular parish, or by the provisions of some act of Parliament: *Andrews* v. *Cawthorne, Dean of Exeter's case.* The special case does not state the existence of such an immemorial custom, nor are we, by consent of the parties, placed in the situation of a jury, and required to draw such inferences from the facts as we should think they ought to draw. There is no doubt very strong evidence of modern user, not necessarily contradicted by the transaction which occurred in 1733, from which user it might be inferred by a jury that there was a certain immemorial burial fee, payable to the minister of the old parish church; but we are not to decide upon that evidence, and cannot therefore say that a fee is due by custom in this case for the celebration of the funeral service, from the defendant, or any one.

The question whether it is given by the provision of the act of Parliament for the building of the new church, and the making of the new cemetery, is more doubtful. The stat. 51 Geo. 3, c. 151, s. 35, which continues Dr. Hislop as the minister, and preserves to the Duke of Portland, as

(*a*) 6 M. & W. 639.

rector, the power of nominating his successor, enacts, that the new minister shall have all the rights to ecclesiastical dues and profits which his predecessors had, but gives no new right. It is questionable whether the sections 49 and 50, which direct the vestry to fix the amount of rates and fees to be paid for the burying in the new church, chapels, and burial-ground, extend to surplice fees, or only to rates and fees payable to the vestry, which, by sect. 71, they are empowered to mortgage, (and they could only have a power to mortgage such rates and fees as belong to themselves). The subsequent section, the 50th, which forbids the lowering of the rates below those of the old cemeteries, was in order to prevent competition; for if the rates in the new cemetery were lowered, a smaller number of bodies would be buried in the old vaults and burial-ground, and thus the existing fees to the minister, clerk, &c., for the burials there would be reduced. The concluding part of the 50th section is rather obscure. It seems to us to mean to reserve to the minister, and all such as were then *entitled*, the fees before payable for burying in *the* old cemeteries,—it may be all the fees payable in the parish,—but it *gives no new fee*. If, however, the vestry had the power, it is clear they have not exercised it, by fixing the amount to be paid *to the rector* from the person liable to pay it. They have stated the rates and fees due to themselves, and then added, without distinguishing how much is to be paid to each, one entire sum for the "rector, clerk," &c., probably in order to intimate that the amount was to be paid to themselves, subsequently to be paid over by them to the "rector, clerk, sexton," &c., but no certain ascertained sum is directed to be paid to the rector.

If, then, the right to a certain fee had been given to the minister by this statute, such fee to be settled by the vestry, the statute has not been carried into effect.

It remains for us to observe, that, supposing an immemorial custom to pay a fixed fee for burial as a surplice fee

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(which is essential to make it legal) had been established, the proper remedy against the party liable to pay it, for non-payment, seems to be in the spiritual court: *Dean of Exeter's case.* It is true, that, if the defendant should be liable for it, and the custom were disputed, a prohibition would be granted if applied for, not propter defectum jurisdictionis, but triationis; the spiritual court not being competent to try a custom, as they used to establish one after an user of forty years or less; *Andrews* v. *Smith* (*a*); whereas the common law requires it to have been from time of legal memory; but still, when established by trial at common law, a consultation would be awarded, and the spiritual court would proceed as it would if the custom were not denied. In recent times, the spiritual court, in order to avoid a prohibition, and endeavouring to conform to the rules of the common law, in the first instance inquires into the immemoriality of the custom; and this explains the judgment of Dr. *Lushington*, in the case in 2 Curteis, 5, in which he treats it as a necessary part of the inquiry whether the burial fee has existed beyond the time of legal memory. This observation does not apply to the case where the fee has been paid to some one, and the minister seeks to recover from the receiver, for the spiritual court has no jurisdiction in that case, and it must necessarily be the subject of a common-law suit.

Judgment for the defendant.

(*a*) 3 Keb. 327.

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A testator, after bequeathing his personal estate, devised as follows:—"I also give all my real estate, in the counties of Pembroke and Carmarthen, to my eldest son John, as aforesaid, *for his life, and to his eldest legitimate son after his death*, and in default of such issue, I give it in like manner to my son Richard; and in case that he has no legitimate issue male, I then give it in like manner to the offspring about to be born from my dearest wife Bessy; and in default of such issue, to my own right heirs for ever:"—*Held*, that John took an estate in tail male, the words "eldest legitimate son" being nomen collectivum.

THE following case was sent by the Vice-Chancellor *Knight Bruce* for the opinion of this Court.

John Lewis, late of Henllan, in the county of Pembroke, Esq., was, at the time of making his will and of his decease, seised in fee simple of certain freehold estates in the counties of Pembroke and Carmarthen. On or about the 28th day of December, 1824, he duly signed and published his last will and testament, in the terms following: "And I do give and bequeath the whole of the residue of my personal property, after the payment of the aforesaid debts, to my son, John Lennox G. P. Lewis; and in case of his death before he attains the age of twenty-one years, then to my son Richard Lewis; and, in case of his death before he attains the age of twenty-one years of age, then to the child shortly about to be born, the offspring of my dearest and most affectionate wife Bessy; and, in case of the death of such offspring before it attains the age of twenty-one years, the interest of the said property I give to my dearest wife Bessy, and, after her death, the principal to be equally divided amongst my surviving sisters. I also give all my real estate in the counties of Pembroke and Carmarthen to my eldest son, John Lennox G. P. Lewis, as aforesaid, for his life, and to his eldest legitimate son after his death; and in default of such issue, I give it, in like manner, to my son Richard; and in case that he has no legitimate issue male, I then give it, in like manner, to the offspring about to be born from my dearest wife Bessy; and, in default of such issue, to my own right heirs for ever. I have made no provision in this my will for my wife Bessy, because she is amply provided for by my settlement made on her before marriage; neither have I provided for my son Richard if his brother John lives, because I know he is otherwise well provided for."

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On the 13th March, 1834, the said testator, John Lewis, died, leaving the said complainant, J. L. G. P. Lewis, his eldest son and heir-at-law, surviving him.

The question in the above case is, what estate the said complainant, J. L. G. P. Lewis, took under the will of his father, J. Lewis, in the said freehold estates in the counties of Pembroke and Carmarthen.

Peacock, for the plaintiff.—J. L. G. P. Lewis took an estate tail. If the words "eldest legitimate son" had stood alone, they would have amounted to words of purchase; but, coupled with the rest of the devise, they are words of limitation. In many cases that construction has been put upon the word "son." *Bifield's case* is thus cited by *Hale*, C. J., in *King* v. *Melling* (*a*):—"A devise to A., and if he dies, not having a 'son,' then to remain to the heirs of the testator. 'Son' was there taken to be used as nomen collectivum, and held an entail." So in *Milliner* v. *Robinson* (*b*), the devise was to the testator's brother John; and if he died, having no son, the land to remain to William for life; and if he died without issue, having no son, to remain to the right heirs of the devisor; and it was held, that John took an estate tail as issue male, and that William had an estate for life only. In *Robinson* v. *Robinson* (*c*), the testator devised his real estate to L. for life, *and no longer;* and after his decease, to such son as he should lawfully have, and in default of such issue, remainder over; and it was held that L. took an estate in tail male. That decision was affirmed on error in the House of Lords (*d*). *Doe* d. *Burrin* v. *Charlton* (*e*) will perhaps be relied upon by the other side. There the devise was to S. for life, remainder to the eldest son of S.; but for want of such issue, then to his daughter or

(*a*) 1 Ventr. 231.
(*b*) Moore, 682.
(*c*) 1 Burr. 38; 2 Ves. sen. 225.
(*d*) 3 Bro. P. C. 180, nom. *Robinson* v. *Hicks*.
(*e*) 1 Scott, N. R. 290; 1 Man. & G. 429.

daughters, share and share alike, for ever; but in case S. had no issue, then to hold to him, his heirs and assigns, for ever; and it was held that S. took an estate in tail general. In the present case, the second son, Richard, would clearly take an estate tail; and the words, "I give it in *like manner*," shew that the testator must have intended that the eldest son should take the same estate.

Rudall, for the defendant.—It is submitted that the plaintiff took an estate for life, with remainder in fee to his eldest son; the term "eldest son" being descriptio personæ. The words, "I give all my real estate in the counties of Pembroke and Carmarthen," are sufficient to pass the fee simple: *Chichester* v. *Oxenden* (*a*), *Roe* v. *Wright* (*b*), *Gall* v. *Esdaile* (*c*), *Randall* v. *Tuchin* (*d*), *Doe* v. *Lawton* (*e*). If this will had merely contained a devise to the plaintiff, with a limitation over to his eldest son, the plaintiff would clearly have taken an estate for life only, with remainder to his son in fee. That is evident from the case of *Gretton* v. *Haward* (*f*), where the testator devised to his wife all his real and personal estate, and after her decease to the heirs of her body, share and share alike, if more than one; and in default of issue, to be at her own disposal; and it was held, that the wife took an estate for life only, with remainder to the children as tenants in common in fee. If the plaintiff takes an estate tail, it must be either on the ground that the word "son" is nomen collectivum, or that an estate tail is implied. First, it is submitted that the word "son" is not nomen collectivum. In the cases in which it has been so held, the estate was not to go over, unless the devisee died, not having "a son." That expression raised an estate tail; but here the devise over is in

(*a*) 4 Taunt. 176.
(*b*) 7 East, 259.
(*c*) 1 M. & Scott, 466.
(*d*) 6 Taunt. 409.
(*e*) 6 Scott, 303.
(*f*) 6 Taunt. 94.

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default of "such issue." *Doe* d. *Burrin* v. *Charlton* (*a*) decided, that a devise to one for life, with remainder to his *eldest son*, but for want of *such issue*, then to his daughter, does not create an estate in tail *male*. In that case, as in the present, the word "son" was not used as nomen collectivum, but with strict reference to a single individual only.

Secondly, the devise over to the plaintiff's eldest son, and in default of issue, to the testator's son Richard, does not raise an estate tail. Where there is a devise to a person for life, with remainder to a son or children for life, or in fee, with a devise over in default of such issue, the words "in default of such issue," refer to the individual before specified, and do not raise a larger estate in the tenant for life: *Rex* v. *The Marquis of Stafford* (*b*). The main question then is, whether the limitation over, in case Richard has no legitimate issue male, increases the estate of John, so as to give him an estate tail. It is submitted that it does not. There is no devise to the male issue, either of John or of Richard, therefore if an estate tail is created, it must be by implication. But if the testator had intended to give John an estate which might defeat the limitation to Richard, he would not have given the estate to John's eldest son. Stress has been laid upon the words, "I give it *in like manner*." But in Co. Litt. 20. b., it is said, "If a man give lands to A., et hæredibus de corpore suo, the remainder to B., in formâ prædictâ, this is a good estate tail to B., for that in formâ prædictâ do include the other." The testator, in using the words, "in case he has no legitimate issue male," meant "in case he has no son." In *Macnamara* v. *Lord Whitworth* (*c*), the devise was of "all my said manors, lands, tenements, and effects, real and personal," to one for life, and after his decease, to his issue male, and the heirs

(*a*) 1 Scott, N. R. 290. (*b*) 7 East, 521.
(*c*) Geo. Cooper, 241.

male of such sons successively, with remainder to A.; "and in default of his issue male *as before*," then over to B.; "and in default of his issue male *as before*," then to the plaintiff: and it was held, that A. was entitled for life, with remainder to his first and other sons in tail male; that B. took in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. In the case of *Goodtitle* v. *Woodhull* (*a*), there was the same discrepancy in the language of the will as in the present case. The devise there was to the testator's son Joshua for life, and then to his male children for their lives, and so to the male children descending from them; and on their decease or failure, then to the testator's son Latimer and the heirs male of his body for the same term of life, and upon the same terms as the devisor intended for his son Joshua, and his male children; and in case of Latimer and his male children failing, then to the testator's son Thomas, and his male children, for the same term of his and their life, and upon the same terms; and it was held, that Joshua took an estate for life only, and that on his death without male issue, Latimer took an estate for life only. *Willes*, C. J., in delivering judgment, says, "The attempt to explain the first clause in this will by the second, and to consider it as turning the first estate into an estate tail, was a very ingenious attempt, and the best argument that could be used; but it is plainly without foundation, for the words of the second clause are, 'to Latimer, and the heirs male of his body, for the same term of life and *upon the same terms* as I intended the same for *Joshua, and his male children;*' but these terms were, 'to Joshua for life, and to his *male children for their natural lives only, and so to the male children descending from them.*' If the devisor had known the sense of the words 'heirs male,' and had intended an estate tail by it, he certainly would have inserted them in the first clause." The

(*a*) Willes, 592.

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construction contended for is consistent with the clause in the will, where the testator says, "neither have I provided for my son Richard, if his brother John lives." *Ginger* v. *White* (*a*) shews, that a devise over in favour of male issue does not necessarily create an estate tail: there the devise was to J. for life, and after his decease, to his male children; and in case J. should die without issue, then to W. in fee; and it was held, that J. took an estate for life only. The words, "in case he has no legitimate issue male," do not imply an indefinite failure of issue, but ought to be restricted to mean "without *such* issue as were inheritable under the prior limitations:" *Morse* v. *Lord Ormonde* (*b*). There are many authorities in favour of such a construction. In *Murray* v. *Addenbrook* (*c*), the words in a will, "failing the male issue," were upon the whole context construed to mean, "if there shall be no son then living." In *Goymour* v. *Pigge* (*d*), the devise was to A. for life, with remainder to her first child, and his or her heirs; but if such child should die under the age of twenty-one years, without leaving issue, then in like manner to the second and third, and every other child of A.; but in case A. died without leaving *issue of her body*, or having issue, such issue should die under the age of twenty-one, without leaving issue, then a devise over; and it was held, that the words "issue of her body" must be understood to mean the "children" to whom (subject to A.'s life estate), the property was devised. Also in *Malcolm* v. *Taylor* (*e*) it was held, that where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over, in the event of the tenant for life dying without

(*a*) Willes, 348.
(*b*) 1 Russ. 382.
(*c*) 4 Russ. 407.
(*d*) 7 Beav. 475.
(*e*) 2 Russ. & M. 416.

issue, it is to be intended a dying without such issue as would take by force of the prior limitations. The rule in *Shelley's case* (*a*) does not apply here. The true principle of construction is stated by Lord *Ellenborough*, C. J., in *Right* v. *Compton* (*b*), where his lordship says, "That the exposition of every will must be founded on the whole instrument, and be made ex antecedentibus et consequentibus, is one of the most prominent canons of testamentary construction; yet where between the parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly; the Court cannot go into one part of a will to determine the meaning of another *perfect in itself* and *without ambiguity*, and not militating with any other provision respecting the same subject matter, notwithstanding a more probable disposition for the testator to have made may be collected from such assisted construction." Assuming that the testator intended to give his son John an estate tail, he has not used proper words for that purpose, and the Court cannot correct his mistake: *Barnacle* v. *Nightingale* (*c*).

But if there is anything on the face of the will from which an estate tail can be implied, then it is submitted that the plaintiff took an estate for life, with remainder in tail to his eldest son: *Doe* d. *Gallini* v. *Gallini* (*d*); *Doe* d. *Bean* v. *Halley* (*e*).

Peacock, in reply.—It is conceded that the Court cannot refer to one part of a will in order to determine the meaning of another part which is free from ambiguity; but

(*a*) 1 Rep. 93, a.
(*b*) 9 East, 272.
(*c*) 14 Sim. 456.
(*d*) 3 Ad. & E. 340.
(*e*) 8 T. R. 5.

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where one part is ambiguous and another clear, the former may be explained by reference to the latter. According to the argument on the other side, the Court must look to that part which is ambiguous for the purpose of altering that which is clear. The estate which John's eldest son takes is no part of the estate which John himself takes, for the words "eldest son" are words of limitation. Richard is to take "*in like manner*" as John; so that, if John took an estate for life, with remainder to his eldest son in fee, there would be a remainder to Richard for life, with remainder to his eldest son in fee. But there is no devise to Richard's eldest son, and the Court cannot imply one. The testator evidently intended to give Richard an estate tail; and if so, John would take the same estate. In the cases of *Goodtitle* v. *Woodhull* and *Ginger* v. *White*, the devise was to a particular person for life, and after his death to his "*children*." If the devise to Richard had stood alone, and the will had been, "I give to my son Richard, and in case he has no legitimate issue male, then I give," &c., Richard would clearly have taken an estate tail: *Sandry's case* (a). The words "eldest son" mean "eldest issue male." *Doe* d. *Garrod* v. *Garrod* (b), *Chorlton* v. *Craven* (c).

POLLOCK, C. B.—We will certify our opinion to the Vice-Chancellor in the usual way, but will now give the reasons for it. I am of opinion that the testator's eldest son, John, took an estate in tail male. The devise is thus:—"I give all my real estate in the counties of Pembroke and Carmarthen to my eldest son John for life, and to his eldest legitimate son after his death; and, in default of such issue, I give it in like manner to my son Richard; and in case he has no legitimate issue male, I then give it in like manner to the offspring about to be born from my

(a) 9 Rep. 27 b.
(b) 2 B. & Adol. 87.
(c) Cited in *Mellish* v. *Mellish*, 2 B. & C. 524.

dearest wife Bessy." It is clear that the testator must have intended by those three expressions to mean, in point of fact, the same thing. John, apparently, is to take an estate for life only, and the argument of Mr. *Rudall* is, that such estate cannot be enlarged. The Court does not enlarge the estate, but merely inquires as to the course in which the estate was intended to go, that is, whether the words "eldest legitimate son" are designatio personæ, or nomen collectivum. There is no reason to doubt that the testator, by the words "eldest legitimate son," meant the same thing as if he had said, "I give the estate to my son John for life, and to his issue male after his death;" that being the expression which he uses with reference to Richard. The will must, therefore, be read as if, instead of using the words "eldest legitimate son" in the devise to John, he had used the same expression as in the devise to Richard. If he had done so, there could have been no doubt that John would have taken an estate tail.

PARKE, B.—I am of the same opinion, and for the same reasons. If the only clause in the will had been the bequest of the real estate to John for life, and to his eldest son after his death, that would probably have been, as Mr. *Rudall* contended, an estate for life to John, with remainder in fee to his eldest son. But, in order to ascertain the testator's meaning, we must look at the limitation coupled with the context. Now, if we look at the context, it is clear that the testator meant that all the three estates should be of the same nature, and in one and the same position. By the second clause, he gives the estate to Richard *alone;* and by the third clause, he gives it to the unborn offspring *alone;* so that, unless an estate tail were given to the two latter, those remainders would not take effect. The testator bequeaths, "in like manner," to his son Richard, and in case he has no legitimate issue male, then he devises over to this offspring about to be born. If that clause had stood alone, there would clearly have been a

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bequest of an estate in tail male to Richard "and the offspring;" and the testator must have meant that the plaintiff should have the same estate. In order to explain the meaning of the words "eldest legitimate son," we must hold this to be a bequest of an estate in tail male to John. The cases cited have not much bearing on the point; the nearest to the present is that of *Goodtitle* v. *Woodhull;* but in that case there was no second clause in the will where the term "issue male" was used, the words being "heirs of the body;" which term was construed in the same sense as the word "children" in the previous part of the will. That observation does not apply here, since the testator meant that the three persons should take the same estate. The words "eldest legitimate son" must be construed as nomen collectivum, and not as designatio personæ.

ROLFE, B.—I am of the same opinion, and for the same reasons; and I will only add one observation. A passage in the subsequent part of the will, though not of itself sufficient to establish the meaning of the former words, does tend to confirm the view which the Court takes of the intention of the testator. The question is, whether John takes an estate for life, with a contingent remainder to his eldest son in fee, with remainder to Richard, or whether John takes an estate tail. In the subsequent part of the will the testator says, "Neither have I provided for my son Richard, if his brother John lives." Now which does that statement fit—an estate for life or an estate tail? It is no provision for Richard if John took an estate tail, but if John took only an estate for life, it would not be correct for the testator to say that he had made no provision for Richard if his brother John lived; he ought, in that case, to have said, that he had made no provision for Richard if John's son lived.

PLATT, B.—I agree with the rest of the Court. The words "*in like manner*" import a gift of the same estate

with respect to Richard as was previously given to John. The testator must have intended that John should take an estate tail, otherwise he would not have used words which created one in Richard. The words are, "and in case he has no legitimate *issue male*," which clearly gives an estate tail to Richard; John will therefore take the same estate. The argument of Mr. *Rudall* goes to this extent, that the Court must insert the word "*such*" before the words "legitimate issue male;" but we ought not to introduce any words into the will. In the former part of the will the testator uses these words: "And in default of *such* issue I give it, in like manner," &c. The words "such issue" mean "legitimate issue male." For these reasons I think that the devise to John is a devise in tail male.

A certificate in conformity with the above opinion was afterwards sent by the Court to the Vice-Chancellor *Knight Bruce*.

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April 16.

Assumpsit on a promissory note by indorsee against indorser. The declaration alleged that the note had been indorsed to the plaintiff by the payee, and averred, "that neither at the time when the note was made, nor afterwards, and before it became due, nor when it became due, and on presentment for payment, had the maker, or the payee, any effects of the defendant in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, or its indorsement by the payee to the defendant; and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note. Special demurrer:—*Held*, that as against an *indorser* the declaration was bad, for not stating a sufficient excuse of want of notice of dishonour; for it was consistent with its allegations, that the note might have been indorsed by the defendant for the accommodation of one of the prior parties to it, in which case the defendant would be entitled to notice of dishonour.

ASSUMPSIT on a promissory note, by indorsee against indorser. The declaration stated, that one G. Jaffrey and R. Kear, on &c., made their promissory note, and thereby jointly and severally promised to pay to Messrs. Becke and Flower, or order, £190 by instalments, (setting out the times of their payment); that Becke and Flower indorsed the note

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to the defendant, who indorsed it to the plaintiff; that G. Jaffrey and Kear did not pay the fifth instalment, although the note was duly presented for payment; that neither at the time when the note was made nor at any time afterwards, and before the instalments became due, nor when they became due, and when the note was so presented for payment, had Jaffrey or Kear, or Becke and Flower, at the said several times, or either of them, or during any part of the time aforesaid, in their hands any effects of the defendant, nor was there any consideration or value for the making of the said note, or of the payment thereof, or for the indorsement of the note by Becke and Flower to the defendant, nor hath the defendant sustained any damage by reason of his not having had notice of the non-payment of the fifth instalment.

Special demurrer, assigning for causes, that the indorser of a promissory note, who is not the payee, being entitled to notice of non-payment, the declaration ought to have averred that due notice was given to the defendant, and that the excuse contained in the declaration for not giving such notice is bad; first, for omitting to shew that no effects of the defendant came into the hands of the maker of the note *after* the default by him in payment of the fifth instalment; and, secondly, for not shewing that the defendant indorsed for value, and did not merely lend his name to give credit to the bill.—Joinder in demurrer.

Kime, in support of the demurrer.—The defendant was entitled to notice of the dishonour of the note. The rule laid down in *Bickerdike* v. *Bollman* (*a*), that the drawer of an accommodation bill (*b*) is not entitled to notice of its non-payment if he had not effects in the drawee's hands, is bottomed on the fraud committed ab initio by the drawer, in

(*a*) 1 T. R. 405; see 3 B. & Ald. 620, 623.

(*b*) See per *Maule*, J., 1 M. & Gr. 764.

drawing a bill knowing that it would not be paid, and fails in application to subsequent parties to a bill. [*Parke*, B.—The defendant is primâ facie entitled to notice of dishonour. That notice is not averred in the declaration; then does it shew that the plaintiff could not have sued any prior parties to the bill?] No.

Needham, contrà.—The declaration having averred that the defendant had sustained no damage from want of notice of dishonour, *Fitzgerald* v. *Williams* (*a*) shews that the defendant was bound to shew that he had, e. g., by losing his remedy over against other parties. [*Parke*, B.—There the plaintiff averred that the defendant had no funds in the acceptor's hands, and had not sustained damage by want of notice of dishonour. The defendant pleaded that he had sustained damage, and then averred immaterial matter, viz. that the acceptor had promised him to provide for the bill at maturity. The only question was, which party was bound to shew that the defendant had sustained damage; and it was held that the defendant was so bound. *Platt*, B.—Had the defendant indorsed the note for the accommodation of Becke and Flower, he might have sued them, and would have been entitled to notice of dishonour, unless they had no effects in the hands of the defendant. The averment that the defendant had sustained no damage from want of notice, is too general, for want of shewing how it was that he had sustained no damage.] Had the defendant indorsed the note for accommodation of Becke and Flower, he must have known that fact, and should have pleaded it. [*Parke*, B.—In order to make out an excuse for not giving notice of dishonour to the defendant, it was for the plaintiff to stop out all right of action by himself against the makers and previous indorsers, Becke and Flower. Now if the makers had had effects of Becke and Flower in their pos-

(*a*) 6 Bing. N. C. 69.

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session, they might have recovered over against the makers, and would therefore be entitled to notice of dishonour by them. That case is not excluded in the declaration by averments. Could the plaintiff have shewn that the note was made by the makers, and indorsed by Becke and Flower, for the accommodation of the defendant, the defendant must have provided for it when due, and would not have been entitled to notice. But he might have indorsed it for the accommodation of Becke and Flower, in which case he would have been so entitled, and you have not stopped out that contingency. It comes to this, that if the plaintiff as indorsee does not give notice of dishonour to the makers or indorsers, he must take the consequences, unless he states in his declaration every circumstance to dispense with the necessity of such notice. That is not done here.] The plaintiff has denied all that lay in his knowledge, and that made it incumbent on the defendant to shew that he had sustained damage. The facts, whether the makers had or had not effects in the hands of the indorsers, were not within the plaintiff's knowledge. *Kemble* v. *Mills* (*a*) shews that this declaration would have been good on general demurrer, for that primâ facie want of notice of dishonour of a cheque on a banker is sufficiently excused by alleging that the banker had no effects of the drawer, and had received no consideration for payment of the cheque, and that the defendant had sustained no damage by reason of his having no notice of dishonour. [*Parke*, B.—That was a case between the original parties, payee and drawer. *Platt*, B.—Had the action been against Becke and Flower, the allegation might have sufficed, but in this action by a second indorsee he must go further, and shew that the makers had no effects of Becke and Flower in their hands at the time of making the bill, or when it became due.] The whole question is, whether the defendant has or has not sustained

(*a*) 1 Man. & Gr. 757.

substantial damage.—He also referred to *De Berdt* v. *Atkinson* (*a*), *Corney* v. *Mendez da Costa* (*b*), *Walwyn* v. *St. Quentin* (*c*), *Sisson* v. *Thomlinson* (*d*), and *Tindal* v. *Brown* (*e*).

Kime, in reply.—The general allegation that the defendant has sustained no damage from want of notice is not demurred to, for, like the statement of alia enormia, it is quite immaterial, and taken alone it could not excuse the want of giving notice. The question in *Fitzgerald* v. *Williams* (*f*) was, on whom was the onus of proof. In *Kemble* v. *Mills* (*g*) there was no special demurrer. This declaration does not shew a primâ facie case. In *De Berdt* v. *Atkinson* the defendant was payee of a promissory note, and so in the same situation as the drawer of a bill. Here he is a simple indorser. That case has been shaken in *Leach* v. *Hewitt* (*h*). [*Parke*, B.—Hewitt there lent his name in fact, and would have had a remedy against Cattle.] In *Corney* v. *Mendez da Costa* fraud prevented the want of notice from operating. In *Goodall* v. *Dolley* (*i*) *Buller*, J., recognises *Bickerdike* v. *Bollman* (*k*), saying that, had the action been against the drawer, he would have been willing to let in the affidavit to shew that the drawer had no effects in the hands of the drawee. [*Parke*, B.—It was no excuse for not giving notice of dishonour to the defendant, being the indorser, that the makers had no effects of Becke and Flower in their hands; see *Wilkes* v. *Jacks* (*l*).]

Cur. adv. vult.

(*a*) 2 H. Bl. 336. As to this case, see 4 Taunt. 733, per *Chambre*, J.
(*b*) 1 Esp. 302.
(*c*) 1 Bos. & P. 652.
(*d*) Selw. N. P. 10th edit. 337. See *Brown* v. *Maffey*, 15 East, 216.
(*e*) 1 T. R. 167.
(*f*) 6 Bing. N. C. 69.
(*g*) 1 Man. & G. 757.
(*h*) 4 Taunt. 731. "Holders," in the marginal note, should be "makers."
(*i*) 1 T. R. 712, 714.
(*k*) Id. 405.
(*l*) Peake's N. P. Cases, 202, Cor. Lord *Kenyon*.

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The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my brother *Platt* and myself, on the last day of the sittings after term. The question was, whether the allegation of the reason for not giving notice to the last indorser of a note, of the dishonour by the maker, was sufficient on special demurrer. [The learned Baron read the pleadings.] By the law of England, differing from the old law of France, it was necessary to give notice of dishonour to other parties on the non-acceptance of a bill, or non-payment of a bill or note, by the drawee or maker. The case of *Bickerdike* v. *Bollman* (*a*) made the first exception, which has given rise to many questions since (*b*). The decision has been often reluctantly acquiesced in, and we cannot help concurring in the opinion of Lord *Tenterden*, in *Cory* v. *Scott* (*c*), who said he always regretted it, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. We are, however, bound by it and the subsequent cases in which exceptions have been established, but we ought not to go beyond them; and the question is, what is now the legal description of the exception, and whether it is sufficiently alleged in this declaration. In the case of *Bickerdike* v. *Bollman* the excuse was matter of evidence; it was not necessary to state it on the record, as the question did not arise in the action on the bill. If it had, perhaps the necessity for an accurate averment on the record might have induced a further consideration of the point. In some subsequent cases, the declaration has been in the usual form, averring notice, apparently in *Walwyn* v. *St. Quentin* (*d*), in *Brown* v. *Maffey* (*e*), *Claridge* v. *Dal-*

(*a*) 1 T. R. 405.

(*b*) See the judgment of *Le Blanc*, J., in *Claridge* v. *Dalton*, 4 M. & Sel. 231.

(*c*) 3 B. & Ald. 622.

(*d*) 1 B. & P. 352.

(*e*) 15 East, 216.

ton (*a*), *Lafitte* v. *Slatter* (*b*), and *Thackray* v. *Blackett* (*c*), certainly in *Cory* v. *Scott*; and an opinion was intimated, that knowledge that the bill would be dishonoured is equivalent to, or evidence in support of, the averment of notice; per *Holroyd*, J., in *Cory* v. *Scott*. The meaning of the word "notice," however, has been now so well settled, *Burgh* v. *Legge* (*d*), and it is so fully established that it means more than "knowledge," and includes an intimation from the party of the fact of dishonour, and that the defendant is looked to for payment, that it must, we think, be now considered as clear, that, if no notice has been given at *any time*, the excuse ought to be set out on the record; if it has been given, but at a time which would be too late in usual course, the matter of excuse might probably be used to shew that it was, under the circumstances, in reasonable time; but if never given at all, the record must state a sufficient excuse. Accordingly, in several cases the excuse has been stated. In *Legge* v. *Thorpe* (*e*), an action against the drawer of a bill, it was averred, that at the time of making the bill, and from thence until and at the time of presenting for acceptance, the drawee had not in his hands any effects of the defendant's, nor had he received any consideration from the defendant for the acceptance or payment of the bill, nor had the plaintiff sustained any damage by not having notice of the non-acceptance or non-payment. If the allegation of excuse for not giving notice had been simply that the defendant had sustained no damage by want of notice, it would have been clearly bad. In *Fitzgerald* v. *Williams* (*f*) the form was somewhat varied; besides the allegation of want of effects, it stated that the defendant had no reasonable ground for expecting that he had or would have any effects in the hands of the drawee, or that

(*a*) 4 M. & Sel. 226.
(*b*) 6 Bing. 623.
(*c*) 3 Camp. 164.
(*d*) 5 M. & W. 418.
(*e*) 2 East, 171.
(*f*) 6 Bing. N. C. 69.

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the drawee would accept the bill, or pay or discharge any part of the amount of the bill, or be provided with funds wherewith he ought to pay the bill or any part thereof, nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the bill. There was a plea, stating that the defendant had sustained damage, and stating its nature, viz. that the drawee had undertaken to provide for the bill and issue thereon. All that the Court decided was, that, the defendant not having proved his plea, the plaintiff's verdict should not be disturbed; but Lord Chief Justice *Tindal* intimated, and we think correctly, that it would have been sufficient if the plaintiff had stopped with the averment of want of effects; and the allegation, that no damage was sustained, seems to have been treated by the Court as immaterial: and in the subsequent case of *Kemble* v. *Mills* (*a*), where there was a count on a cheque, with a less full excuse for the want of notice, stating the want of effects, that the drawers had not received any consideration for the payment of the cheque, nor that the defendant received any damage by reason of the want of notice of non-payment; the defendant having demurred generally, the Court of Common Pleas held the allegation sufficient on general demurrer. We do not conceive that the Court attributed any weight, in giving their judgment, to the averment that the defendant had sustained no damage. The Lord Chief Justice and Mr. Justice *Maule* expressly excluded that consideration, and rested on the broad ground that the averment of want of assets was sufficient. In an action against the drawer of a bill, this form, therefore, must be deemed sufficient, at least on general demurrer. Every bill, primâ facie, must be taken to have been drawn for value received; that is, on a person who was to accept and pay by reason of having value; and if the drawer draws on one who is not his debtor, nor has received any

(*a*) 1 Man. & G. 757.

value for the bill, he must be considered, at least primâ facie (so says *Bayley*, J., in *Cory* v. *Scott*), to request him to accept and pay on account of the drawer; or in other words, for his accommodation; and if he does not provide funds in time, he necessarily knows that the bill would not be paid at maturity. He is the person who himself ought to pay the bill, and consequently primâ facie cannot be entitled to notice. But the case of an indorser of a bill of exchange stands on a different footing from that of a drawer. He is in the nature of a surety or guarantor of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawee and drawer: Story on Bills, p. 314. He is primâ facie entitled to notice. It is not enough to exempt him, that the bill is drawn without value, and that the drawer has no effects in the hands of the drawee: *Wilkes* v. *Jacks* (*a*). If he indorses to the holder without value or effects in the hands of prior parties, non constat that he is not entitled to notice; for he may have indorsed for the accommodation of others, in which case it is now clearly established by *Norton* v. *Pickering* (*b*), that he has a right to notice, because on payment he may recover over against those persons. It does not appear to us, therefore, to be enough to dispense with notice, or even primâ facie, against an *indorser*, simply to state that he had indorsed without value, or had no effects in the hands of the prior parties. And the allegation, that no damage was sustained by him by want of notice, is clearly insufficient. If this proposition be true of the indorser of a bill, it is equally true of the indorser of a note. The cases in which the indorser has been held liable without notice, have had some other material circumstance; as, for instance, that he had funds put into his hands by the drawer, out of which he was to pay the bill or note: *Corney* v. *Mendez da Costa* (*c*). We think, therefore, that the

(*a*) Peake's N. P. C. 202. (*b*) 8 B. & Cr. 610. (*c*) 1 Esp. 302.

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averments in this declaration are insufficient on this special demurrer. It is consistent with every one of those averments, that the note may have been indorsed by the defendant for the accommodation of one of the prior parties,—some third person; and in that case the defendant was entitled to notice, and this is one of the causes of demurrer specially stated. Our judgment is therefore for the defendant. The plaintiff may, however, amend on the usual terms.

Leave to plaintiff to amend, otherwise

Judgment for the defendant.

April 17.

TATTERSALL *v.* PARKINSON.

Assumpsit. First count on a bill of exchange for 26*l.* 13*s.* 2*d.* Second count for £30 for money lent, and on an account stated. Pleas.—First: Non assumpsit to the last count, except 10*l.* 9*s.* 1*d.* Second: Plea to the whole declaration, except 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment before action brought, and a set-off. Last plea as to 10*l.* 9*s.* 1*d.* parcel of the first, and 10*l.* 9*s.* 1*d.* parcel of the last count, payment into court of £11. (See Reg. Gen., Trin. 1 Vict.). On special demurrer to the last plea, it was held bad, for setting up as a defence payment of a less sum than the whole sum admitted to be due and pleaded to, without other answer as to the difference than no damages, ultra the sum paid in.

Where the declaration has a count on a bill, and also an indebitatus count for the consideration for the bill, *e.g.* money lent, *semble*, that to prevent the plaintiff from recovering on both counts by due payment into court, the defendant should plead to both counts, that the bill was given on account of the debt in the second count, and then allege payment into court of the amount of the bill and interest.

ASSUMPSIT on a bill of exchange for 26*l.* 13*s.* 2*d.*, by indorsee against the second indorser. In the second count the defendant was stated to be indebted to the plaintiff in £30 for money lent, and on an account stated. Pleas, first, as to the last count of the declaration, except as to 10*l.* 9*s.* 1*d.*, non assumpsit. Second and third, to the whole declaration, except as to 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the second count, payment before action, and set-off; and lastly, as to 10*l.* 9*s.* 1*d.*, parcel of the sum in the first count, and as to 10*l.* 9*s.* 1*d.*, parcel of the sum in the second count, payment into court of £11,

d that the plaintiff has not sustained damages to a greater ıount than £11.

Special demurrer to the last plea, assigning the follow- ɜ causes: that, although the said last plea is pleaded to d professes to answer two separate and distinct sums money of 10*l.* 9*s.* 1*d.* each, amounting in the whole to ɜ sum of 20*l.* 18*s.* 2*d.*, nevertheless the defendant has ıaded payment into court of £11 only, which constitutes answer to part only of the said two sums. Also, that ɜ said plea is inconsistent and repugnant, in this, to wit, ıt although the defendant, in the introductory part of ɜ said last plea, admits the plaintiff to have sustained da- ıges to the amount of 20*l.* 18*s.* 2*d.*, yet the defendant, in ɜ concluding part of the said last-mentioned plea, alleges ıt the plaintiff has not sustained damages to a greater ıount than £11 in respect of the causes of action in the roductory part. Also, that if the said sum of £11 is to taken as a payment of the said sum of 10*l.* 9*s.* 1*d.* in ɜ last count, that, in such case, the last plea amounts a plea of the general issue as to part of the said sum of *l.* 9*s.* 1*d.* in the first count, which is forbidden by the les of court, Hil. 4 Will. 4.

The plaintiff's points for argument were, that the last ıa is bad in substance: that it affords no sufficient ıwer to that part of the declaration to which it is ıaded; that the mere payment into court of £11 can- t be pleaded as a satisfaction for 20*l.* 18*s.* 2*d.*, which ɜ plea professes to answer, and which is admitted by the ıa to be due; and therefore a portion of the sum to ich the plea was pleaded is wholly unanswered: that ɜ plea is bad for repugnancy, professing in the intro- ctory part to be pleaded to two distinct sums, together ual to 20*l.* 18*s.* 2*d.*, to which amount the plea admits the intiff to have causes of action, and yet alleges that the intiff has not sustained damages ultra £11, in respect the causes of action in the introductory part of the

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plea mentioned: that the plea is bad for not specifically shewing to what portion of the sum of 10*l.* 9*s.* 2*d.* excepted from the first count, the sum of £11 paid into court is to be applied; and that, supposing the sum of £11 is to be taken as pleaded to the last count, then a portion of the sum of 10*l.* 9*s.* 2*d.* excepted from the first count, remains unanswered, except by an argumentative denial of its ever having existed, which is bad, as amounting to the general issue, and which, if proper in form, would be bad when pleaded to any portion of a count upon a bill of exchange, as that plea is forbidden by Reg. Gen., Hil. 4 Will. 4.

Gordon, in support of the demurrer (Feb. 15).—The plea is bad. It was long ago settled as a general principle of law, that the payment of a sum of money smaller than a sum admitted to be due, is not, without more, satisfaction of the larger sum: *Pinnel's case* (*a*). In *Sibree* v. *Tripp* (*b*), this Court, though declining to support the doctrine laid down in *Cumber* v. *Wane* (*c*) to its full extent, yet did not repudiate the above principle (*d*). *Down* v. *Hatcher* (*e*) shews that a plea of payment of a smaller sum in satisfaction of a larger is bad, even after verdict in arrest of judgment; and *Todd* v. *Stewart* (*f*), in the Queen's Bench, upholds that case. This is a liquidated demand, for money lent and on an account stated, so as to admit of payment into court, and is made such by the plea.—He was then stopped by the Court, who called on

Hugh Hill, contrà.—This plea is good. There was no other way of putting the defence on the record, so as to comply with the form given by the rule of court, Hil. 4

(*a*) 5 Rep. 117.
(*b*) 15 M. & W. 23.
(*c*) Stra. 426.
(*d*) See *Thomas* v. *Heathorn*, 2 B. & C. 477.
(*e*) 10 Ad. & E. 121.
(*f*) 14 L. J., Q. B., 150.

Will. 4. No ground of demurrer is alleged for not stating with certainty how much of the sum paid into court should be applied to one count, and how much to the other. That question is not open, and if it had been, the plea need not have stated any such matter. In *Jourdain* v. *Johnson* (*a*), there was a count on a bill, with the common counts provided by Reg. Gen., Trin. 1 Will. 4, claiming £100 as due to plaintiff for money paid; £100 for money lent; £100 for goods sold; £20 for interest; and £100 on an account stated. The pleas were, first, as to the *first* count, and as to 12*l.* 2*s.*, parcel of the sum of £100 in the *second* count, alleged to be due from the defendant to the plaintiff for goods sold; and as to the £100 in the second count alleged to have been found due from the defendant to the plaintiff on an account stated, that the defendant paid into court 51*l.* 9*s.* 7*d.*, and the plaintiff had not sustained damage ultra that sum, in respect of so much of the causes of action mentioned in the declaration as were before specified in the plea. There was a special demurrer for two causes (*b*); first, that a less sum was paid into court in satisfaction of a greater pecuniary claim admitted in certain by the plea, and that the sum paid into court, as to each debt, is not stated; secondly, that the declaration consisted of six counts, and not two only, as treated in the plea. The last ground of objection prevailed: but the judgment shews that, had payment into court been pleaded to the whole declaration, except as to that part which related to the bill, it would have been good, the sums declared for being all of them liquidated damages, admitting of that plea; for neither plaintiff nor defendant is bound by the precise sums laid in the counts; and the defendant, who pays a sum into court, only admits that so much, and no more, is due by way of liquidated damages on all of them. The Court continues—" The plea would, therefore, be good so far as

(*a*) 2 C., M., & R. 564; 5 Tyrw. 524. (*b*) See per Cur., 5 Tyrw. 531.

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relates to the whole declaration, except the claim on the bill of exchange. Then, is it necessary to specify how much is paid in on one part and how much on another?" After deciding that one sum might, since the new rule, still be paid into court generally on all the counts, the judgment proceeds—"If, then, a plea of payment of 51*l.* 9*s.* 7*d.* into court on *all* the demands, except that on the bill of exchange, would be good, there is not the least ground for saying that it would not be good as to *part* of those demands. The count on the bill creates some difficulty. Supposing that, to an action on a bill of exchange, there was a plea of payment into court of a less sum than the amount alleged to be due on the bill, it might be objected, that the plea admitted the larger ascertained sum to be primâ facie due from the defendant, but that the part paid could not satisfy the whole of the sum, and that the plea contained no answer or ground of defence, as to the remainder. For, if the plea of payment of money into court should be considered in the nature of a plea of non assumpsit as to the residue not paid into court, it would be inapplicable to a bill of exchange, as to which a plea of non assumpsit is inadmissible; the record would contain no proper answer as to the residue, unless there was an allegation of some special ground of defence in that respect (*a*), as part payment, or failure of consideration as to part. It is therefore very questionable whether such a plea would be good, and also questionable whether it is made good by the plea of payment into court, on the whole declaration, of a larger sum than the amount of the bill; for so much as would cover that amount is not necessarily to be ascribed to the bill. We do not, however, find it necessary to decide the point." Here the defendant admits the bill, and would not be allowed to shew anything to answer the first count on it. The sum paid in covers the sum excepted from that count,

(*a*) See 8 M. & W. 228.

and the sums in the other counts being immaterial, the plea answers them. A jury might find that the defendant was not indebted in more than £11; and he would then be entitled to judgment, on proof that the sums claimed in them were mere consideration for the bill. No rule of law proves that any sum is ex necessitate due on them. [*Parke*, B.—The 10*l.* 9*s.* 1*d.* might have been paid in on them.] *Mee* v. *Tomlinson* (*a*) was entirely overruled by *Marshall* v. *Whiteside* (*b*), and by *Bright* v. *Beard* (*c*). Lord *Denman* is there reported as saying, "No case was ever more completely overruled than *Mee* v. *Tomlinson*" (*d*). The plea is good on general demurrer. Had the cause gone to trial, proof that 10*l.* 9*s.* 1*d.* was not due on the bill would not have been admissible. Had that sum been lent by the plaintiff to the defendant, and secured by the bill, the verdict must have been for the defendant; for, on these pleadings, the payment into court was on the bill; and if the plaintiff proved his claim on the indebitatus counts, without proving the bill, he would only have been entitled to the 10*s.* 11*d.*, the difference. Had there been a nolle prosequi as to the first count, the defendant could not have shewn that he gave the bill for the money lent, for there would have been no issue on which to present the bill to the jury. The plea, as pleaded, was requisite to prevent the plaintiff from recovering more than once.—The Court here called on

Gordon to reply.—The sum to be pleaded as paid into Court must be that mentioned in the introductory part of the plea. [*Parke*, B.—As a plaintiff may recover less than he claims in his declaration, so the plea may allege that less

(*a*) 4 Ad. & E. 262.

(*b*) 1 M. & W. 191; Tyr. & Gr. 791.

(*c*) 4 Q. B. 837.

(*d*) Quære, tamen, if it is overruled except as to the second resolution; effect was given to the first in *Rayner* v. *Wright*, 3 Q. B. 922. See also *Mitchell* v. *Townley*, 7 Ad. & E. 164; *Collingbourne* v. *Mantell*, 5 M. & W. 289.

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is due than is there claimed.] This question now arises on special demurrer. In *Down* v. *Hatcher* (*a*), a plea of payment of a smaller sum in satisfaction of a greater, was held bad even after verdict. That case is recognised in *Todd* v. *Stewart* (*b*). The tender of a smaller sum is no answer to a claim of a larger; for a tender is only on the road to payment. A fortiori, mere payment into court of a smaller sum cannot be satisfaction of a larger sum admitted to be due, as is here done by the plea. In *Fischer* v. *Aidè* (*c*), the plaintiff was entitled to nominal damages at all events. [*Parke*, B.—The inconsistent set of issues was the reason of that decision.] The ground of inconsistency is not omitted in this demurrer. The decision on the seventh plea in *Mee* v. *Tomlinson* is not overruled (*d*), and applies. The plea is also bad on the last ground. [*Parke*, B.—The payment into court of £11 is not to be taken as a payment into court on the last count. Probably money lent was the matter for which the bill was given, and the ground of the account stated in that count. The plaintiff might recover on both the bill and the account stated, if any such account was proved. It is, on the plea, ambiguous how and on which count the difference between 10*l.* 9*s.* 1*d.* and £11 paid in is disposed of. It is not pleaded that 10*l.* 9*s.* 1*d.* is paid in on the first count; but that is not made a ground of special demurrer. The defendant has not confessed anything to be due, but admits the existence of the bill. Had judgment gone by default as to the remainder, he would be entitled to the whole then remaining due. Payment into court as to part does not admit that part to be due, any more than if pleaded to the whole it would admit the whole to be due. It only admits liability on the contract to be so much, and

(*a*) 10 Ad. & E. 121.
(*b*) 14 L. J. (N. S.) Q. B., 150.
(*c*) 3 M. & W. 486.
(*d*) See ante, p. 757, n. (*d*).

no more. Payment into court came in place of the old rule of striking out part of the damages in the declaration upon a rule for paying money into court. To save expense in proving that rule, it was ordered by the new rule that payment into court should be put on the record by way of plea, leaving its effect on the same footing as before. The bill is a liquidated sum, and admitted; the rest is unliquidated. By pleading a payment into court as to so much, the defendant does not admit so much to be due, or anything but the bill.] If the sum of 10*l.* 9*s.* 1*d.*, excepted by the plea from the last count, is answered by the payment into court, part of the first count is still unanswered; for the argumentative denial of its ever having existed amounts to the general issue, non assumpsit, which cannot be pleaded to the count on the bill since the pleading rules of court of Hil. 4 Will. 4: *Armfield* v. *Burgin* (*a*).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued on the last day of the sittings after term, before myself and my brother *Platt*.

The declaration was in assumpsit, against the second indorser of a bill for 26*l.* 13*s.* 2*d.* The first count was on the bill, the second count for £30 for money lent, and on an account stated.

The defendant, as to the last count, except 10*l.* 9*s.* 1*d.*, pleaded non-assumpsit, and as to the whole declaration, except 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, pleaded payment before action brought, and also a set-off. And as to 10*l.* 9*s.* 1*d.*, parcel of the first, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment into court of £11, in the usual form.

(*a*) 6 M. & W. 486.

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To this there was a special demurrer, assigning several causes.

The case of *Jourdain* v. *Johnson* (*a*), and the other authorities cited by Mr. *Hugh Hill* for the defendant, decided, that the plea of payment into court may be made, generally speaking, as to part of several counts, without stating how much was paid in on each. There is therefore no available objection in this case on that ground; but where one of the counts is on a bill of exchange, the difficulty arises which was pointed out in that case of *Jourdain* v. *Johnson*, but not decided, viz., that if less than the amount of the bill of exchange should be considered as paid in on that count, the plea would be bad: for if it admitted the bill, it admitted primâ facie the precise sum to be due on it, and less than that would not legally satisfy it; or, if it should be considered in the nature of a plea of non assumpsit to the remainder, the new rules forbid such a plea, and the record would contain no proper answer to the residue, unless there was an allegation of some special ground of defence; as part payment, or failure of consideration as to part. And we do not see how this objection can be surmounted, if this demurrer properly raises it, which we think it does.

Again, if the sum of 10*l.* 9*s.* 1*d.* is to be ascribed to the first count, the sum of 10*s.* 11*d.* only must be applied to the last count; and it is argued, and with great weight, that less than the whole admitted sum cannot be paid into court in satisfaction.

There are, no doubt, very great difficulties in adapting the new rule, as to payment of money into court, to practice in some cases; and they were probably not foreseen in framing the rule, the object of which was to avoid the trouble and expense of proving payment into court in the old way, by supplying a ready mode of obtaining the same object, by a statement on the record.

(*a*) 2 C., M., & R. 561; 5 Tyrw. 524.

One of these difficulties arises from the form of a count in indebitatus assumpsit. In this form, (which has been adopted for the sake of convenience, as it would be impossible to declare on each separate contract without great prolixity of pleading), each count may be interpreted to mean that the defendant is indebted to the plaintiff in the sum mentioned, either on one contract to pay that precise sum, or one contract on a quantum meruit, which has resulted in a debt which the plaintiff estimates at that amount; or on several different contracts for different precise sums, or on each on a quantum meruit, or on some for a sum certain, and some on a quantum meruit, together amounting to the sum claimed.

The variety of meanings which the comprehensive allegation of a debt in such a count is capable of bearing, creates a considerable difficulty in specially pleading to it, and particularly in the payment of money into court.

If a smaller sum is paid in on such a declaration than the sum claimed, the plea admits that the sum claimed is due on one or more *contracts* for liquidated *or* unliquidated amounts. If unliquidated, there is no difficulty in paying in a smaller sum than the amount claimed, for then the defendant may truly say that the plaintiff has not sustained greater damage than the sum paid into court. But if the sum admitted is liquidated, or is an aggregate of liquidated sums, how can the plaintiff have sustained less damage than the liquidated amount in respect of the demand for that sum?

The Court of Queen's Bench has already decided, in *Down* v. *Hatcher* (*a*), that a plea of accord and satisfaction by a less sum, to a general declaration in indebitatus assumpsit for a larger sum, is bad, even after verdict. These considerations lead us to the conclusion, that the form of plead-

(*a*) 10 Ad. & Ell. 121.

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ing payment of a less sum of money into court than the sum pleaded to, with no answer to the difference, except that no more damages have been sustained, is objectionable; and that there is good reason for saying, that the ordinary practice of pleading payment of money into court to so much of the declaration as is equal to the amount paid in, is the best that can be adopted. On these grounds also we think the plea in its present form is bad.

Mr. *Hill* argued, that there is no other way than this where the indebitatus count is really for the sum which is the consideration of the bill. Certainly there must be some mode of pleading applicable to such a case, for without doubt the plaintiff cannot recover both the amount of the bill on the count upon the bill, and the amount of the consideration on the indebitatus count; but it is not necessary for us to decide in what form such plea ought to be; probably it would be sufficient to plead to both counts, that the bill was given on account of the debt in the second count, and then to plead payment into court of the amount of the bill and interest.

The plea in its present form is bad, but the defendant may amend on the usual terms.

Judgment accordingly.

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HUMBERSTON and Another, Executor and Executrix of PHILIP HUMBERSTON, deceased, *v.* RICHARD JONES. *April* 21.

In 1773, J. J. mortgaged premises in fee to M. to secure £1000, with the usual proviso for redemption on payment, &c., and without any power of sale. In 1837, by indenture between R. J., the heir-at-law of J. J., of the first part; R., the devisee of M., of the second; and H., of the third; reciting that the £1000 was still due to R., and that H. had agreed to pay it off, and had advanced to R. J. £1723 more; R., in consideration of the £1000. and R. J., conveyed the same premises to H. in fee, subject to a proviso for redemption of payment of £2723, and interest, with a covenant by R. J. to pay that sum on a day different from that limited in the deed of 1773, and a power of sale in case of non-payment of the said sum of £2723 and interest, or any part thereof, on the day thereby limited for payment thereof:—*Held*, that this deed required an ad valorem stamp in respect of the £1723; and also a deed stamp in respect of the new security taken for the £1000.

COVENANT on an indenture of release by way of mortgage, for non-payment of principal and interest. Plea, non est factum. At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1846, the plaintiff put in evidence the mortgage-deeds, which were dated 29th and 30th November, 1837. The indenture of release, which was made between the defendant of the first part, John Rogers of the second part, and the plaintiffs' testator of the third part, bore an ad valorem stamp of £6, with proper followers. It recited a prior mortgage in fee of the same premises, by indentures dated 2nd and 3rd March, 1773, by one John Jones (whose heir-at-law the defendant was stated to be) to John Mercer, for securing £600, and further charges, by subsequent deeds, to the amount of £400, in favour of Mercer, and of John Rogers, his devisee. It was then recited, that the said sums of £600 and £400 were still due to the said John Rogers, on the security of the mortgaged premises; that the plaintiffs' testator had agreed to pay off the £1000, and had advanced to the defendant the further sum of £1723; and it was witnessed, that the said John Rogers, by direction of the defendant, in consideration of the £1000 paid to him, and the defendant, conveyed the mortgaged premises to the plaintiffs' testator in fee, subject to a proviso for redemption thereof, on payment to the plaintiffs' testator of the sum of £2723 on the 30th of March then next. The indenture then contained a covenant by the defendant to pay the said sum of £2723 on the day before appointed for payment thereof, and also a power of sale on

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non-payment of the said sum, or any part thereof, on that day. By the deed of 1773, the day limited for the payment of the £600 was the 3rd of September then next following; and that deed contained no power of sale.

It was contended by the defendant's counsel, on the authority of *Brown* v. *Pegg* (*a*), that, inasmuch as the indenture on which this action was brought contained a new covenant for payment of the whole sum of £2723, at a different day from that limited in the indenture of 1773 in respect of the £1000, the stamp of £6, which was applicable only to the additional sum of £1723, was not sufficient. The learned judge reserved the point, and the plaintiffs had a verdict for the amount claimed, subject to a motion to enter a nonsuit.

In the following term, *J. Henderson* obtained a rule nisi pursuant to the leave reserved.

Crompton shewed cause at the sittings after Hilary Term (February 12).—The question in this case turns on the construction to be put upon the Stamp Acts, 55 Geo. 3, c. 184, sched. part 1, tit. "Mortgage," and 3 Geo. 4, c. 117, s. 2. The 55 Geo. 3, c. 184, makes a stamp of £6 necessary for a mortgage, where the sum secured exceeds £1000, and is less than £2000; and imposes other stamps in the case of the transfer of a mortgage. Then the stat. 3 Geo. 4, c. 117, by the first section, repeals so much of the former act as related to the transfer of mortgages, and by the second section enacts, that in lieu of the duties imposed thereby on the transfer of mortgages, "upon any transfer, assignment, &c., of any mortgage," provided no further sum of money be added to the principal money already secured, there shall be paid a duty of 1*l.* 15*s.* for the first skin, and a further progressive duty of 1*l.* 5*s.* for every 1080 words over and above the quantity of 2160 words: "and if any further

(*a*) 6 Q. B. 1.

sum of money or stock shall be added to the principal money or stock already secured, the ad valorem duty on mortgages, payable under the said recited act, shall be charged *only in respect of such further money or stock.*" Now this deed is no more than a transfer or assignment of the old mortgage, with an additional advance of £1723 secured thereby; the duty payable, therefore, is an ad valorem duty on the £1723, viz. £6. If an ad valorem duty be charged upon the whole £2723, then duty will have been paid twice over on £1000 of it. It is said that the new covenant for payment of the entire £2723 makes a difference in the case; but there is no foundation in principle for that: the new covenant makes no alteration in the estate or interest conveyed. Nor can a larger stamp be necessary by reason of the power of sale, which is merely the ordinary clause introduced by all modern conveyancers into mortgage-deeds. The case of *Doe* d. *Bartley* v. *Gray* (*a*) is in point for the plaintiffs. There Carter, the owner in fee of the estate, had mortgaged it to Rowlands for 1000 years, to secure £150. Then Rowlands, in consideration of £150 paid to him by Worsley, and Carter, in consideration of £200 more advanced to him by Worsley, concurred in assigning the term to a trustee for Worsley to secure the £350, and by the same deed Carter released the reversion in fee to Worsley for the same purpose: and it was held, that this deed was liable only to an ad valorem duty on the £200, and a progressive duty, and that the conveyance in fee did not make it liable to be stamped as a fresh mortgage for the whole £350. *Lant* v. *Peace* (*b*), which may be relied on for the defendant, is distinguishable. There the defendant Peace mortgaged land to the plaintiff Lant, to secure £400, and afterwards borrowed of him £1000 more, and mortgaged to him other land as a security for the whole £1400: and it was held, that the stamps necessary on the latter

(*a*) 3 Ad. & Ell. 89. (*b*) 8 Ad. & Ell. 248.

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deed were an ad valorem stamp on £1000, and a deed stamp in respect of the fresh security for the £400. But that case differs from the present in the circumstance that here there is no fresh security; the mortgage is only of the same estate which was before charged with the £1000. *Brown* v. *Pegg* (*a*) is also distinguishable. In that case the defendant Pegg had demised certain premises to Vale for 1000 years, as a security for a sum of money, and by a subsequent deed he charged the same premises with a further sum advanced by Vale, making in all £150. Vale required payment, and the plaintiffs having agreed to advance the money, a deed was executed, whereby, in consideration of the payment of £150 by the plaintiffs to Vale, and a further advance of £15 to the defendant, the latter conveyed the land in fee to the plaintiffs, subject to a proviso for reconveyance on payment by the defendant of the £165 and interest, and Vale also assigned the term of 1000 years to the plaintiffs. It was there held that a deed stamp was necessary, on the ground that the conveyance in fee created a new security. That reason does not apply to this case, for here both mortgages were in fee. There is a passage in Jarman's Conveyancing, by Sweet, vol. 5, p. 541, which may appear favourable to the defendant's view; where it is said, with reference to the case of *Doe* d. *Bartley* v. *Gray*, "It was not necessary to decide whether the deed there adjudged to be a transfer of a mortgage, required a common deed stamp in addition to the ad valorem duty on the further advance, as the aggregate amount of duty impressed thereon was more than sufficient to cover both. The point, however, seldom arises in practice, as the deed commonly contains a covenant to pay the extra debt, or some other additional matter extraneous to the instrument, considered as a transfer of mortgage properly so called, and therefore rendering it unquestionably liable to the additional stamp

(*a*) 6 Q. B. 1.

in question." This, however, is not the language of Mr. Jarman himself, but of his present editor, Mr. Sweet. *Doe* d. *Barnes* v. *Rowe* (*a*), and *Doe* d. *Bowman* v. *Lewis* (*b*), are authorities to shew that this stamp is sufficient.

J. Henderson, in support of the rule.—In the first place, the mortgage of 1837 being an entirely new transaction, whereby a new security is taken, not for £1000, but for the entire sum of £2723, an ad valorem stamp on that entire sum was necessary for it. It differs in many respects from the old mortgage-deed. That deed is in the usual form of a mortgage, the estate being made defeasible on the ordinary condition, viz., payment of principal and interest on a day named; while this indenture gives an absolute power of selling the premises, and contains an entirely new covenant, to pay the entire sum, composed of the former and the present advance, on a different day. It is as much a new mortgage for the whole sum as if the former mortgage had never been made. But, secondly, at all events this deed ought to have been impressed with an ordinary deed stamp, in respect of the transfer of the security for the £1000. The 3rd section of the 3 Geo. 4, c. 117, throws a strong light on the intention of the legislature as to these duties. It enacts, that, where any deed or other instrument is made as an additional security for any sum of money secured by any bond on which the ad valorem duty on bonds shall have been paid, such deed shall be exempted from the ad valorem duties on mortgages, and shall be chargeable *only with the ordinary duty on deeds;* but if any further sum shall be added to the principal money already secured, the ad valorem duties shall be added in respect of such further sum. *Brown* v. *Pegg* is, however, a direct authority that a deed stamp is necessary in this case, for the covenant for payment of the

(*a*) 6 Bing. N. C. 737. (*b*) 13 M. & W. 241.

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£1000, on different days from those named in the deed of 1773, together with the power of sale, make it a new security, within the principle of that decision. *Lant* v. *Peace* is also in point for the same reason.

Cur. adv. vult.

The judgment of the Court was now pronounced by

PARKE, B.—This was an action of covenant, for non-payment of mortgage money and interest to the plaintiff. Upon non est factum, the question was, whether the indenture was properly stamped. My brother *Wightman*, before whom the case was tried at Liverpool, reserved the point, and the case was argued at the sittings after last term.

The indenture was on a £6 stamp, with a proper progressive duty. It was dated in 1837. It recited a prior mortgage in fee by Jones, the original mortgagor, of certain messuages, &c., to John Mercer, by indenture of 1773, for £600, and further charges to the amount of £400 in favour of Mercer, and Rogers, his devisee; and further, that the defendant was heir-at-law of Jones, and that £1000 was still due to Rogers on the security of the said messuages, and that the plaintiff had agreed to pay the £1000 to Rogers, and had advanced to the defendant £1723; and it was witnessed that Rogers, in consideration of the £1000 paid to him by the plaintiff, at the request of the defendant, and the defendant, conveyed to the plaintiff the messuages &c. in fee, subject to a proviso of redemption on payment of £2723 to the plaintiff. This indenture contained a covenant by the defendant to pay the aggregate sum of £2723, on different days from those specified in the original mortgage of 1773 (which was produced on the trial), and also a power of sale, for the whole sum, which was not inserted in the first mortgage.

Mr. *Henderson* argued, that the stamp of £6, which was the proper ad valorem duty on a mortgage for £1723, was

insufficient, and that there should have been some further duty paid.

The question arises on the proper construction of the 3 Geo. 4, c. 117, which repealed the duties on transfers of mortgages, contained in the schedule to 55 Geo. 3, c. 184. Under the act of 3 Geo. 4, if there is nothing but a transfer of the mortgage, a stamp duty of 1*l.* 15*s.* is imposed. If any further sum of money is added to the principal sum of money secured, the ad valorem duty on mortgages, payable by the former act, is to be charged only in respect of such further money. The decision in the case of *Doe* d. *Barnes* v. *Rowe* (*a*) establishes, that if this be a transfer of the former security only, and a new advance, upon the same security, of a sum of money, the ad valorem duty on the latter is sufficient, and no further stamp is necessary. But if, besides the transfer of the former mortgage, a fresh security is added for the sum originally lent, as where the first mortgage is of a term, and the second conveys the fee to secure the old and new advance in one aggregate sum, it has been decided that a further stamp is necessary, by the case of *Brown* v. *Pegg* (*b*), such a case not falling within the provisions of the 3 Geo. 4, c. 117. We cannot distinguish that from the present case. This is not a transfer from the first mortgagee to the plaintiff, giving him only the same security which he had, and the same right to the land conveyed; but here is a fresh covenant from the defendant to the plaintiff, to pay, at different times, the original advance of £1000, as well as the subsequent advance of £1723; and here is also a power to raise the former as well as the latter sum by sale of the estate. The deed, therefore, contains more than a transfer of the old mortgage, and the advance of a further sum, and consequently requires a further stamp than the ad valorem duty on the new advance.

(*a*) 4 Bing. N. C. 737. (*b*) 6 Q. B. 1.

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We yield reluctantly to the objection, and decide that the rule must be made absolute, unless the plaintiffs choose to have a new trial on payment of costs, in order to have the deed re-stamped with a proper stamp.

Rule absolute accordingly.

IBBETT v. LEAVER.

May 8.

If a judge's order for particulars of set-off directs them to be given with dates, but the particulars are delivered without dates, the plaintiff need not object or take out a summons for better particulars; and defendant cannot at the trial give evidence of his set-off. But after verdict for the plaintiff, the Court granted a new trial, on an affidavit of merits, and on payment of costs and bringing the money into Court.

DEBT.—The declaration was on an I. O. U. for £38. Plea, a set-off for money paid, money had and received, and on an account stated. On 23rd March, the plaintiff obtained the following order for particulars of set-off: "Upon hearing &c., I do order that the defendant's attorney or agent shall deliver to the plaintiff's attorney or agent an account in writing (*with dates*) of the particulars of the defendant's set-off in this action, on or before &c., or in default thereof the defendant shall be precluded from giving any evidence in support of such set-off at the trial of this cause." The particulars delivered under this order stated the items claimed, but *without* dates. The plaintiff did not object, or take out a summons for better particulars, but went to trial on 23rd April, and there contended that the defendant's neglect to furnish the dates as ordered precluded his right of proving the items of his set-off. *Alderson*, B., was of that opinion. Verdict for the plaintiff for the amount of the I. O. U.

Humfrey, for the defendant, had obtained a rule for a new trial, on the ground of surprise, and on an affidavit of merits.

Crowder and *Pigott* shewed cause, relying on the defendant's non-compliance with the judge's order. [*Parke*,

B.—Compliance with the judge's order as to dates is a condition precedent, so that no evidence of the items of set-off could be given in this case, unless the plaintiff has waived the objection by accepting the particulars.] The omission of the dates is not sworn to be a mere oversight; it may have been a trick. [*Rolfe*, B.—Is it sworn that the defendant thought the plaintiff meant to waive the objection? *Platt*, B.—If no particulars were delivered under that order, that would be one thing, but if particulars were delivered, though not exactly framed according to the order, the plaintiff might have applied for better particulars.] The particulars were delivered under the order. The defendant may bring a cross action.

POLLOCK, C. B.—The plaintiff has been quite regular, and his cause was ripe for execution, but the defendant interposes delay. The plaintiff is entitled to reap some benefit from the event of the trial, or a defendant, by lying by and suffering a verdict to be taken, might swear to surprise and get a new trial, and so obtain time. There is, however, an affidavit of merits, and if the money is paid into court there may be a new trial.

PARKE, B.—The order imposed the condition of setting out dates in the particulars of demand. I generally strike out that condition. Here, however, it existed, and not being complied with, the judge was right in refusing the evidence of set-off. However, on the affidavit of merits, and on payment of the money into court, there may be a new trial.

ROLFE, B.—My impression was, that, although the defendant's particulars ought not to evade giving the plaintiff the information specified in the order, his not taking out a summons for better particulars looked very much like a trap for the defendant.

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PLATT, B.—My impression is, that the particulars did convey sufficient information, or before going to trial the plaintiff would have taken out a summons for better particulars. His lying by looks like a trick. In the case of particulars of demand, where insufficient particulars were delivered under an order, still, if the defendant went on by ruling the plaintiff to reply, he was taken to have accepted that particular, and waived a right to a better (*a*).

Rule absolute, on payment of costs, and bringing the £38 into court in a fortnight.

Humfrey and *Keating*, in support of the rule.

(*a*) See *Wallis* v. *Anderson*, Moo. & M. 291.

May 8.

In actions by engineers and other persons employed in constructing railways, the particulars of demand must be as specific as it is possible for the plaintiffs to make them, and a mere statement of aggregate sums claimed in respect of tavern bills, assistant surveyors, &c., finding surveyors, meeting and arranging with solicitors, &c., will not suffice.

PRICHARD *v.* NELSON.

ASSUMPSIT for work and labour as an engineer, with counts for money paid, and on an account stated. The particulars of demand were as follows:—

"*Prichard* v. *Nelson*. To personally examining the country between Northampton and Warwick, by way of Daventry, Southam, Leamington, and between Napton and Warwick by way of Leamington; also sidings at Northampton, and sidings at Weedon; and also a certain other branch from Leamington to Fenny Compton; and another branch between Stockton and Rugby Railway, all in the counties of Northampton and Warwick; making sundry trial sections, laying out the main line and branches, and alternative line; finding engineers, surveyors, levellers, superintending the same; meeting solicitors, arranging with them; assisting at the reference; taking all cross sections of the roads, and making the proposed alterations therein; getting out the finished plans

and sections; furnishing the solicitors with tracings to take reference; meeting solicitors; putting numbers on plans to correspond with the reference; laying out all the gradients and curves on the plans and sections; superintending the engravings, and furnishing the engravers from time to time with the requisite plans and sections; correcting the proofs; sundry meetings with the chairman and committee of self and assistants; and generally directing and superintending all the different departments of engineering, surveying, levelling, and office-work generally, and engraving and lithographing, &c., including tavern charges, travelling charges, and material charges, &c.; also including enlarged plans of part of the Northampton, Daventry, Southam, Leamington, and Warwick, and time and expense of surveyors, &c.; assisting the solicitors with books of reference both in London and the country, &c.; as comprised in the following items:—

As regards the London and Birmingham extension from Northampton to Warwick, and Fenny Compton branch, and Northampton and Weedon sidings, and other deviations therefrom, and different extra works, &c.:—

	£	s.	d.
For assistant surveyors and engineers in the works of engineering and surveying, and services appertaining to the same, between 1st Sept. and 3rd Dec. 1845. Engaged equal to 1000 days .	3217	16	7
For travelling and personal expenses, and other charges for the engineers and surveyors during the above-named term, and between 1st Sept. and 3rd Dec. 1845	1853	5	7
To sundry inn and tavern charges, posting, and other expenses of self and assistants, engineers, surveyors, messengers, and others, between 1st Sept. and 3rd Dec. 1845	518	19	0
To sundry petty expenses in travelling, for post-boys, gates, toll-bars, messengers, fare by railways, and other expenses of self and assistants, engineers, surveyors, messengers, clerks, &c., between 1st Sept. and 3rd Dec. 1845 . .	141	8	10
For sundry charges for materials, in ordnance sheets, drawings, tracings, mapping, maps, plan-books, and other things and matters, for the			

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	£	s.	d.
purpose of the above surveys, &c., between 1st Sept. and 3rd Dec. 1845	129	5	5
To office work generally, as before described at the commencement, between 1st Sept. and 3rd Dec. 1845	522	0	0
To office work generally, as before described, between 3rd Dec. 1845 and 30th June, 1846, including estimates and parliamentary attendance	602	4	0
To different general extras not included in above, between 1st Sept. and 3rd Dec. 1845 . .	160	0	0
For own personal services between 1st Sept. and 3rd Dec. 1845	403	4	0
For parliamentary plans and sections, and other and several matters relating to the "Warwick and Napton Canal Route," and the "Rugby Branch," and certain deviations therefrom, &c., between 1st Sept. and 3rd Dec. 1845 .	1980	0	0
For expenses and services in respect of the said canal deviations, and other matters, between 1st Sept. and 3rd Dec. 1845	135	17	5
	£9664	0	10

Mellor, for the defendant, obtained a rule calling on the plaintiff to shew cause why further and better particulars should not be delivered in the action.

Martin shewed cause.—*Higgins* v. *Ede* (*a*), and *Rennie* v. *Beresford* (*b*), are in point to shew that the particulars given in this action are sufficient to produce the result of the amount claimed.

POLLOCK, C. B.—Those cases have been impugned by other judges. We have now learned that in these actions the defendants are in general unacquainted with the work which has been going on. That makes a great difference. Better particulars must be furnished.

PARKE, B.—Experience shews that actions of this de-

(*a*) 15 M. & W. 76. (*b*) Id. 78.

scription are in general brought to charge persons who are quite strangers to what has been done, and who have not employed the plaintiff otherwise than by construction. These cases are now better understood from our seeing more of them. Here, for instance, as to the item of £518, it should be stated how many persons were fed, and for how long, so as to explain the generality of that item. Particulars of demand, which are to convey information to persons only constructively liable, should be more explicit on that account.

ROLFE, B.—It is difficult to say à priori what should be stated in particulars; but when I see that a party has fairly communicated all he can, I should not be very nice about petty variances.

PLATT, B.—"Engaged equal to 1000 days" would be satisfied by the labour of 1000 men on one day. The defendants are entitled to know the number of men employed on each day.

Rule absolute.

SADLER and Another *v.* JOHNSON.

April 21.

ASSUMPSIT on a guarantee. The defendant pleaded non assumpsit, and other pleas.

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, the plaintiffs tendered in evidence the following unstamped guarantee, given by the defendant to them:—

"Gentlemen,—In consideration of your consigning to my friends, Messrs. Hyde, Gardiner, & Co., of Calcutta, Co., of Calcutta, sixteen casks of Sherry wine, and engaging to pay me one per cent. on the amount of the proceeds, I hereby agree to guarantee to you the proper sale of the said wines, and the payment of the proceeds in due time.—J. J."

The following document is within the exemption of the Stamp Act, relating to "the sale of goods, wares, and merchandize:" —"Gentlemen, In consideration of your consigning to my friends, Messrs. H. &

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sixteen casks of Sherry wine, and engaging to pay me one per cent. on the amount of the proceeds, I hereby agree to guarantee to you the proper sale of the said wines, and the payment of the proceeds in due time.

"J. JOHNSON."

On the part of the defendant, it was objected that this document was not admissible in evidence for want of a stamp, inasmuch as it did not fall within the exemption of the Stamp Act, "relating to the sale of any goods, wares, or merchandize." The learned judge overruled the objection, and a verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a verdict for him.

Crowder now moved accordingly, for a rule to enter a verdict, or for a nonsuit.—The guarantee was not admissible in evidence for want of a stamp. The Stamp Act, 55 Geo. 3, c. 184, sched. part 1, tit. "Agreement," exempts from duty any "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, and merchandize." This document is not an agreement of that nature. Its primary object is to guarantee the due payment of the proceeds of the sale, in consideration of the appointment of the defendant's friends as consignees, and of the engagement to pay the defendant one per cent. In *Smith* v. *Cator* (*a*), a letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession or about to be placed in his hands, should remain unsold at the time of the bills falling due, was held to require a stamp. There *Abbott*, C. J., after adverting to the exemption of the Stamp Act, says, "We think that description is confined to instruments whereof the sale of goods is the *primary* object,

(*a*) 2 B. & Ald. 778.

and it appears to us that the primary object of this letter was the obtaining of money on a pledge of goods expected to arrive in England, and intended to be placed in the hands of the plaintiff on their arrival." In *Chanter* v. *Dickinson* (*a*), the memorandum was as follows:—"Send me a license to use two of A.'s patent furnaces, to be applied to a singe plate, for which I agree to pay as agreed, £25 as a patent-right, and which is to include iron-works, fire-bricks, and labour; engineers or furnace-builders' time, to superintend or fix the above order, to be paid 6*s*. per day;" and this was held not to be within the exemption of the Stamp Act, as either the primary object of the agreement was the license, or it was an agreement for the erection of fixtures. So here, the sale of the goods is a mere secondary or collateral object. Suppose an agreement was made with a shopkeeper, that he should sell certain goods in his shop; that, in one sense, would relate to the sale of goods, but it would not be an agreement within the exemption of the statute.

PARKE, B.—There ought to be no rule. In cases of this kind, it may be difficult to draw the precise line, but I think that this agreement clearly relates to the sale of goods. The primary object was, that the goods should be sold through the agency of the defendant's friends at Calcutta.

ROLFE, B., concurred.

PLATT, B.—The exemption in the Stamp Act is for the purpose of protecting commerce, and ought therefore to receive a liberal construction. It is true that this document in some degree relates to the sale of goods, and in some degree to the conduct of the parties who are to sell

(*a*) 5 Man. & G. 253; 6 Scott, N. R., 182.

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the goods; but that is only part of the machinery by which the sale is to be effected. The agreement contemplates a sale of the goods by certain persons at Calcutta; and for the purpose of effecting that object the guarantee is given. It is therefore an agreement relating to that contract of sale, which was the primary object of the parties.

Rule refused.

April 23.

DOE *d.* HUGH THOMAS and Others *v.* ROBERTS.

H. T. being seised in fee of certain premises, devised the same to his son W. T. for life, with remainder to the issue of W. T. as tenants in common in fee. In April 1845, W. T. died, having by will appointed executors, who managed the estate for the infant children of W. T., and, in the years 1845 and 1846, received rent from the defendant, who had been in possession prior to the death of W. T.: —*Held*, that the acts of the executors did not bind the infant children, and that the latter might maintain ejectment against the defendant without any previous notice to quit or demand of possession.

EJECTMENT for a messuage and land in the county of Carnarvon. The declaration contained demises, dated the 16th May, 1846—1st, by Hugh Thomas and Thomas Williams; 2nd, by Henry Williams; 3rd, by William Hugh Thomas, Hugh Thomas, and Margaret Anne Thomas; 4th, by William Hugh Thomas; 5th, by Hugh Thomas; 6th, by Margaret Anne Thomas. There were also demises by the same parties, dated the 8th January, 1847.

At the trial, before *Coltman*, J., at the last Carnarvon Assizes, it appeared that the ejectment was brought to recover possession of a farm called Tyddyn Agnes, of which one Hugh Thomas being seised in fee, by his will, bearing date the 8th April, 1819, devised the same to his son William Thomas for life, with remainder to trustees to preserve contingent remainders, with remainder to the issue of his said son William Thomas as tenants in common in fee, with remainders over in default of issue. On the 15th April, 1845, William Thomas, the tenant for life, died, having by his will appointed the lessors of the plaintiff, Hugh Thomas and Thomas Williams, his executors. The other lessors of the plaintiff were the children of William

Thomas, the eldest of whom was only fifteen years of age. After the death of William Thomas, the lessors of the plaintiff, Hugh Thomas and Thomas Williams, managed the estate for the infant children of William Thomas, and, in the years 1845 and 1846, received rent from the defendant, who appeared to have been in possession prior to the death of William Thomas. On those occasions they gave the defendant receipts, which stated the rent to be received by them *as executors of William Thomas.* When the last rent was paid, Hugh Thomas (the executor) told the defendant, in the presence of the widow and two of the children of William Thomas, that notice to quit would be given unless the defendant consented to pay an additional rent of 6*l.* a year, to which he assented. This ejectment was brought without any previous notice to quit, or demand of possession. The learned judge told the jury, that unless there was an agreement by the children, or by some person authorised by them, that the defendant should continue in possession as tenant, the plaintiff was entitled to recover; and he left it to them to say whether, when Hugh Thomas received the rent, he acted as agent for the children. The jury found, that "Hugh Thomas acted merely as executor, not as authorised agent for the children, but as next friend, and without any authority to act;" and the verdict was accordingly entered for the plaintiff on the demises by the children.

Townsend now moved for a rule nisi to set aside the verdict, and for a new trial, on the ground of misdirection.—The defendant was entitled to notice to quit. The fact of his having been allowed to remain in possession for nearly two years after the death of the tenant for life raises a strong presumption that a tenancy was created. In *Doe* d. *Oates* v. *Somerville* (*a*), where a rector succeeded to a rectory

(*a*) 6 B. & C. 126.

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on the death of a former incumbent, and the tenants of the former incumbent continued in possession for some months afterwards, it was held that the new rector could not maintain ejectments without giving them a notice to quit, as he must be presumed to have assented to the continuance of their tenancy on the same terms as before. So, where a tenant for life made a lease for years, to commence on a certain day, and died before the expiration of the lease, in the middle of a year, and the remainder-man received rent from the lessee (who continued in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease; that was held evidence from which the Court might presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold from the day and according to the terms of the original demise: *Roe* d. *Jordan* v. *Ward* (*a*). [*Parke*, B.—This case is different. A next friend cannot bind an infant, because an infant cannot appoint an agent. If an infant makes a feoffment by letter of attorney, nil operatur; otherwise, if he make the feoffment in person (*b*). The tenancy from year to year, which was created during the life of William Thomas, ceased at his death, and the defendant then became tenant by sufferance only. Those entitled in remainder might have ejected him immediately, unless they had done some act by which they made him tenant from year to year.] In the case of *Maddon* d. *Baker* v. *White* (*c*), it was held, that where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. [*Pollock*, C. B.—In that case the tenancy from year to year was good against the infant.] Here a tenancy has been created, either by

(*a*) 1 H. Bla. 96.
(*b*) Chamb. on Infancy, 433, 443.
(*c*) 2 T. R. 159.

the children, or by Hugh Thomas acting as their agent. [*Parke*, B.—That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law: the lease of an infant, to be good, must be his own personal act.]

PER CURIAM (*a*).—Rule refused.

(*a*) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

TAYLOR *v.* BURGESS.

May 3.

In June, 1828, a defendant was taken in execution upon a ca. sa., and in April, 1836, the plaintiff died. The Court refused to discharge the defendant out of custody upon his affidavit, that he had been informed and believed that no legal personal representative had revived the action, or had taken any proceedings whatever since the death of the plaintiff.

G. T. WHITE moved to discharge the defendant out of custody. It appeared that he had been taken in execution upon a capias ad satisfaciendum on the 18th June, 1828, and had ever since remained in custody. In the month of April, 1836, the plaintiff died. The defendant's affidavit stated, that he had been informed and believed that no legal personal representative had revived the action, or had taken any proceedings whatever since the death of the plaintiff. A summons had been taken out before a judge to discharge the defendant, and had been served upon the agent for the attorney on the record, but it was not attended either by the agent or the attorney, on the ground that the attorney was not then concerned in the business.—In *Broughton* v. *Martin* (*a*), the Court discharged a defendant out of custody who was in execution at the suit of a plaintiff some time since deceased, on whose part no will had been proved, nor any administration granted,

(*a*) 1 Bos. & P. 176.

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and whose family, on notice of a motion for the above purpose, declined to interfere. So, in *Parkinson* v. *Horlock* (a), the Court discharged a defendant out of custody after the plaintiff's death, it appearing that the next of kin did not intend to take out administration, the rule nisi having been served on the next of kin. In *Gore* v. *Wright* (b), *Coleridge*, J., decided, that where a defendant is in execution and the plaintiff dies, a rule may be made absolute in the first instance for his discharge, on production of an affidavit by the next of kin, that it is not his intention to prove any will, or to take out administration.

POLLOCK, C. B.—Your objection is that there is no person who can give a legal discharge on payment of the debt, but that is not sufficiently made out.

PARKE, B.—There is no ground laid for the interference of the Court. Still, if the defendant is prepared to pay the money into Court, there will be no difficulty in getting out of custody.

ROLFE, B.—The defendant ought to have ascertained that there was no personal representative of the plaintiff.

Rule refused.

(a) 2 N. R. 240. (b) 1 Dowl. P. C., N. S., 864.

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The PACIFIC STEAM NAVIGATION COMPANY *v.* LEWIS. *May* 7.

A declaration stated that the plaintiffs were a company incorporated for the purpose of providing steam vessels, and employing the same along the shores of North and South America, in the Pacific Ocean: that the plaintiffs, at the defendant's request, purchased of the defendant, and the defendant sold to the plaintiffs, for the use and supply of the said steam vessels, 485 tons of coals, subject to the conditions that they were "of a suitable quality to be used in steam vessels, and were adapted for all closed furnaces or stove fires where a steady, strong, and lasting heat was desirable; that they would burn with little or no smoke, would make but a small quantity of ashes, would ignite easily with a good draught, would open and swell out, would not cake and unite like the bituminous coal, and would burn without being stirred." The declaration then averred that the defendant promised the plaintiffs that the coals were of a suitable quality to be used in steam vessels, &c., and stated as the breach, that the coals were not of a suitable quality to be used in steam vessels, (negativing the terms of the contract and promise), but, on the contrary thereof, were slow and difficult of ignition, and would not burn in a manner useful or available for the purposes of steam vessels, &c. The defendant pleaded (with other pleas), the general issue, and also that the said coals were of a suitable quality to be used in steam vessels, &c., (traversing the terms of the breach). Prior to the sale, the defendant delivered to the plaintiffs a printed advertisement or statement, in which the qualities of the coal were described as in the declaration. Upon the sale an invoice was delivered which described the coals as "steam coals." At the trial, it appeared that the coals were unfit for steam vessels, but the plaintiffs failed to prove that the printed statement or advertisement formed any part of the contract. The judge at Nisi Prius having, by consent, referred the question of amendment to the Court:—*Held*, that the Court might amend the declaration, by striking out the allegation of the qualities of the coal, and substituting a statement that the coals were "of fit quality for working steam engines, and generating steam for steam engines."

ASSUMPSIT.—The declaration stated, that the plaintiffs, at the time of the making of the promise, &c., were, and still are, a body corporate, under and by virtue of letters patent to them granted by our sovereign lady the Queen. That in and by the said letters patent it was and is (amongst other things) declared that the said corporation should be established for the purpose of providing vessels to be impelled by steam, and of employing the same upon such stations as might appear to be expedient within the limits therein mentioned, and which said limits were by the said letters patent declared to be along the shores of North and South America in the Pacific Ocean, &c. That before and at the time of the sale and delivery to the plaintiffs of the coals hereinafter mentioned, the plaintiffs were desirous of purchasing coals of a good and suitable quality for the supply and use of steam vessels of the plaintiffs, whereof the defendant then had knowledge and notice. That the plaintiffs heretofore, to wit, on &c., at the request of the defendant, purchased from the defendant, and the defendant then sold and delivered to the plaintiffs, for the use and supply of the said steam vessels, a large quantity, to wit, 485 tons of coals, at and for certain prices then agreed on

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by and between the plaintiffs and the defendant in that behalf, and amounting in the whole to a large sum of money, to wit, the sum of 266*l.* 15*s.*, upon and subject to the following terms and conditions, (that is to say), that the said coals should be and then were of a fit, proper, and suitable quality to be used in steam vessels, [and were peculiarly adapted for all closed furnace or stove fires where a strong, steady, and lasting heat was desirable. That the said coals would burn with little or no smoke, and would make but a small quantity of ashes, and that the said coals would ignite readily with a good draught, and would open and swell out, and would not cake and unite like the bituminous coal, and that they would burn without being poked or stirred.] And thereupon, in consideration of the premises, the defendant then promised the plaintiffs that the said coals then were of a fit, proper, and suitable character to be used in steam vessels, [and more particularly adapted for all closed furnace or stove fires, where a strong, steady, and lasting heat was desirable; that the said coals would burn with little or no smoke, and would make but a small quantity of ashes, and that the said coals would unite readily with a good draught, and would open and swell out, and would not cake and unite like the bituminous coal, and that they would burn without being poked or stirred.] And the plaintiffs aver, that although the plaintiffs, then and upon the occasion of the said sale and delivery to them as aforesaid, took and received the said coals from the defendant upon the terms and conditions aforesaid, and afterwards, to wit, on &c., paid to the defendant the price and value thereof: yet the defendant disregarded his said promise, and deceived the plaintiffs in this, to wit, that the said coals were not at the time of the said sale or delivery thereof, or at the time of the making of the promise, or at any time afterwards, of a quality, fit, proper, or suitable for use in steam vessels, &c., (negativing the terms of the contract and promise alleged); but on the contrary thereof, the plaintiffs in fact say, that they having, after the making of the said promise

of the defendant, and in reliance upon the same, to wit, on &c., caused the said coals to be shipped and conveyed in a certain vessel to certain ports and places within the limits mentioned in the said letters patent, to wit, to Valparaiso and Lima, for the use and supply of the steam vessels of the plaintiffs there, and at other ports and places within the limits aforesaid; and having then caused the said coals to be placed in a certain closed furnace and stove fires in certain steam vessels of the plaintiffs, then plying with goods and passengers for hire and reward to the plaintiffs within the limits aforesaid, to wit, from Valparaiso to Callao, and in which said fires a strong, steady, and lasting heat was desirable, (and which said fires then were of the description ordinarily used and proper to be used in steam vessels), where there was a good draught, the said coals then proved to be and then were very slow and difficult of ignition, and would not and could not be made to burn in a manner to be at all useful or available for the purposes of the said steam vessels, and were found to be and were very unsuitable and improper for the purpose of being used in steam vessels, and wholly unfit for and unusable in the same, and the said coals in burning and consuming then also emitted and discharged very large and unusual quantities of sulphurous, dense, noisome, and offensive smoke, and made, deposited, and produced, and were resolved into, very large and unusual quantities of ashes and sand, and to such an extent that all the cabins, apartments, decks, and other parts of the said vessels, and the furniture, fittings, stores, and provisions of and belonging to the same, and the air in, upon, over, and about the same became and were covered, filled, and impregnated with the smoke and ashes, &c.

Pleas.—First, non assumpsit. Secondly, that the plaintiffs were not nor are a body corporate under or by virtue of the said letters patent. Thirdly, that the said coals were of a fit, proper, and suitable quality to be used in steam vessels, and were peculiarly adapted for all closed furnace or stove fires, where a strong, steady, and lasting heat was

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desirable; and that the said coals would burn with little or no smoke, and would make but small quantities of ashes; and that the said coals would ignite readily with a good draught, and would open and swell out, and would not cake and unite like the bituminous coal, and that they would burn without being poked or stirred, according to the true intent and meaning of the said promise of the defendant in that behalf.—Issues thereon.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas Term, it appeared that the plaintiffs were a company incorporated by charter, for the purpose of providing steam vessels, to be employed in certain stations in the Pacific Ocean; and that the chairman of the company was introduced to the defendant, who was the owner of certain coal mines at Llanelly in South Wales, called the Cwm Vale Colliery, with the view of becoming the purchaser of the produce of those mines on behalf of the company. On that occasion the defendant handed to the chairman the following printed document:—

"LLANELLY CWM VALE STEAM COAL.

"This coal burns with little or no smoke, and makes but a small quantity of ashes. The few clinkers from it do not adhere to the bars, and are easily removed, requiring the fires to be cleaned out much seldomer than when the common bituminous coal is used. From the great strength and durability of this coal, a saving will be effected by its use over the bituminous coals generally employed fully equal to one-fourth, or four tons will go as far as five tons, which is of the greatest importance to steam packets. It is peculiarly adapted for breweries, distilleries, and all closed furnace or stove fires, where a strong, steady heat is required.

"Directions for its use.

"This coal ignites readily with a good draught, and opens and swells out in a peculiar manner, but does not cake and unite like the bituminous. It will burn up with-

out being poked or stirred, and does best with a thin fire; poking checks rather than rouses the fire, and should not be allowed. The fire should be fed regularly in moderate quantities at a time. The supply should be thrown, and not raked, over the surface of the fire, forming over it, as far as possible, an equal layer. The coal being much stronger than that generally used, a smaller quantity is required at a time. Attention should be paid to this, and a little experience will teach the judicious manner of using it; but the necessity of allowing it to burn without much stirring cannot be too strictly attended to. When dust and ashes collect on the bars of the furnace, the poker should be used from underneath, to clear and freshen the fire, being careful not to disturb the surface too much. The bars of the furnace should be full three quarters of (but not exceeding) an inch apart, and about five or six inches of fire on them is found to answer best. This coal is shipped on board small class vessels, at the Old Dock in Llanelly harbour, or on board vessels of such size as require to be loaded afloat, at the neighbouring harbour called Bury Port, where ships of any tonnage, up to 2000 tons burthen, can be kept afloat in dock. All orders for coal, or application by letter for any further particulars, to be addressed to

"The Agent for D. Lewis, Esq.,
"Cwm Vale Colliery Office,
"Llanelly, South Wales."

The plaintiffs afterwards purchased of the defendant 485 tons of these coals, and received the following invoice:—

"CWM VALE COLLIERY, LLANELLY.

"The Directors of the Pacific Steam Navigation Company to David Lewis, Esq.

"June 24, 1840.—To 485 tons of Lewis' Llanelly Cwm Vale steam coals, shipped for the barque Portsea, Captain Samuel Thomas Yetts, bound for Valparaiso, 11*s.* per ton. £266 15 0"

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The coal having been taken on board the plaintiffs' vessels, was found to be unfit for steam purposes, and incapable of generating steam, and also to contain large quantities of sulphur, which had an injurious effect upon the engineers, passengers, and crew. On the part of the defendant, it was contended that the contract alleged in the declaration was not proved, inasmuch as the printed document formed no part of the contract, but was a mere statement of the quality of the coal. The Lord Chief Baron was of that opinion, and on the plaintiffs applying to him to amend the declaration by striking out the parts within brackets, and inserting therein "that the coals were of fit quality for working steam engines, and for generating steam for steam engines," the learned judge declined to do so, on the ground that there was no evidence to support the proposed amendment. It was subsequently agreed that the question of amendment should be referred to the Court. The jury found a verdict for the defendant on the first issue, and for the plaintiffs on the other issues.

The *Attorney-General* had obtained a rule to shew cause why the verdict for the defendant on the first issue should not be set aside, and the plaintiffs be at liberty to amend the declaration and record, and a new trial had upon such terms as the Court should direct; against which

Watson (*Cleasby* with him) shewed cause.—First, there is no evidence to support the proposed amendment. The advertisement or printed paper contains a mere description of the quality of the coal; in no part of it is there found any such contract as the plaintiffs are desirous of stating in the declaration. The order was given for that particular coal called "steam-coal," not for coal fit for working steam-engines, and for generating steam for steam-engines. Where a party purchases a chattel for a certain specific purpose, there is a warranty on the part of the seller that the chattel shall be fit for that purpose; but where the party orders a

chattel, believing that it will answer a particular purpose, the vendor complies with the terms of the contract by delivering a chattel of the description ordered, though it may be unfit for the purpose to which the vendee wished to apply it. In the case of *Chanter* v. *Hopkins* (*a*), the defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent copper and apparatus, to fit up my brewing copper with your smoke-consuming furnace." The plaintiff accordingly put up one of his patent furnaces on the defendant's premises; but it was found useless for the purposes of a brewery, and the Court held that there was no implied warranty on the part of the plaintiff that the furnace supplied should be fit for the purposes of a brewery; but that the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine.

Secondly, the amendment cannot be made under the 3 & 4 Will. 4, c. 42, s. 23. That statute enables the judge to amend, in case of a "variance in any particular in the judgment of such judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced." But the effect of the proposed amendment would be to substitute an entirely different contract. *Brashier* v. *Jackson* (*b*), and *Boucher* v. *Murray* (*c*), are authorities to shew that in such case the Court has no power to amend under the statute. The defendant would have been prejudiced by the amendment made at the trial, inasmuch as if the contract had been truly stated, he would have paid money into court. But if this is an application to the general jurisdiction of the Court, the rule should have been moved on affidavits, in order that the defendant might be enabled to answer the facts. [*Pollock*, C. B.—That might

(*a*) 4 M. & W. 399. (*b*) 6 M. & W. 549. (*c*) 6 Q. B. 362.

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be so if the defendant moved on a state of facts which did not appear at the trial, but it is not so here.]

The Court then called on

Martin and *Phipson* to support the rule.—First, there was evidence to go to the jury of a contract for the sale of coals of fit quality for working steam-engines and generating steam for steam-engines. The case resembles that of *Power* v. *Barham* (*a*), where, in an action for breach of warranty of pictures, it was proved that the defendant at the time of the sale gave the following bill of parcels:—"Four pictures, Views in Venice, *Canaletto*, £160;" and it was held to have been rightly left to the jury to say, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description or intimation of opinion. So in this case, it was for the jury to say whether the contract was for a particular coal called steam-coal, or whether it was for coal fit for generating steam for steam vessels.

Secondly, the Court has power to amend. Before the 3 & 4 Will. 4, c. 42, amendments by reason of variance were frequently allowed on application to the Court. That was done in the case of *Swallow* v. *Beaumont* (*b*). But this amendment may be made under the statute. The phrase "not material to the merits of the case," means not material to the substantial controversy between the parties. Every amendment is, in one sense, material to the merits of the case, or it would be useless to make it. [*Pollock*, C. B.—"Not material to the merits" means not material to the real question at issue between the parties.] The meaning of the statute is, that if there shall be a variance between the setting forth on the record and the proof of

(*a*) 4 Ad. & E. 473. (*b*) 2 B. & Ald. 765.

any contract, an amendment may be made, provided the parties have notice that the matter to be decided is the same matter in respect of which the amendment is to be made. Here the defendant has pleaded, and came to prove, that the coal was fit for generating steam in steam vessels; he could not therefore be prejudiced by the amendment. The power to amend should be co-extensive with the right which the plaintiff formerly possessed of inserting several counts. In *Smith* v. *Knowelden* (*a*), *Tindal*, C. J., says: "The object of the legislature in passing the statute being to prevent the necessity of multiplying counts, it would be unjust to tie a plaintiff down to the restrictions imposed by the new rules of pleading, if he were not at the trial to have the full benefit of the power of amendment intended to be conferred by this section." And in *Sainsbury* v. *Matthews* (*b*), *Parke*, B., says, "Unless the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly." There are numerous instances in which the statement of the contract has been amended in more material respects than in the present case: *Parry* v. *Fairhurst* (*c*), *Evans* v. *Fryer* (*d*), *Ward* v. *Pearson* (*e*), *Chapman* v. *Sutton* (*f*), *Dimmock* v. *Sturla* (*g*), *Clarke* v. *Morrell* (*h*), *Jacob* v. *Kirk* (*i*).

Watson, in reply, cited *Davis* v. *Preece* (*k*), and *Brooks* v. *Blanchard* (*l*).

POLLOCK, C. B.—At the trial of this cause, it was objected that the contract was not proved, and I directed the jury to find a verdict for the defendant on the first issue.

(*a*) 2 Man. & G. 564.
(*b*) 4 M. & W. 343.
(*c*) 2 C., M., & R. 190.
(*d*) 10 Ad. & E. 609.
(*e*) 5 M. & W. 16.
(*f*) 3 Dowl. & L. 646.
(*g*) 14 M. & W. 758.
(*h*) 1 Man. & G. 841.
(*i*) 2 Moo. & Rob. 221.
(*k*) 5 Q. B. 440.
(*l*) 1 C. & M. 779.

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An application was made to amend the declaration, which I refused, not because I entertained any doubt of my power to amend under the statute, but because I thought that the statement of the contract, even when amended, could not be proved. An arrangement was then made that the matter should come before the Court on a motion for a new trial, and that the parties should be in the same position as if the amendment had been made at Nisi Prius. There was, no doubt, a contract for the sale of coal represented to be "steam-coal," either as being a particular description of coal so called, or as being coal fit for generating steam for steam vessels. Such a contract would be satisfied by the delivery of that kind of coal called "steam-coal," or by the delivery of coal fit for generating steam in steam vessels. The real question then is, what is the meaning of the term "steam-coal?" That is a question for the jury, and not for us, to decide. I agree that we ought to be most liberal in making amendments. The power to amend was given contemporaneously with the restriction imposed upon a plaintiff or defendant of inserting several counts or pleas, and I think that great injustice would be done, unless the Courts, in their administration of the law, should make the remedy co-extensive with the mischief intended to be prevented. It is wrong to suppose that this amendment would substitute one contract for another. There is, in truth, only a mistake about the same contract. Suppose there had been two counts in the declaration, the one framed on the invoice, and the other on the express warranty contained in the advertisement, an application would most probably have been made to strike out one of the counts, on the ground that there were not in fact two contracts, but one only. There is but one contract, whether it is to be proved by the advertisement, or by the invoice, or by both. This, then, is a case in which a plaintiff proceeding on a contract has failed by reason of a variance in his statement of it, and I think that we are at liberty to direct an amendment. It must be, however, on

payment of costs, with liberty for the defendant to plead de novo.

PARKE, B.—I am of the same opinion. Early in the discussion I thought that the amendment might be made, if not under the statute, yet by virtue of the general jurisdiction which the Courts exercise in many cases after trial and before final judgment. The doubt which I at one time entertained was, whether this case was within the statute; but that doubt is entirely removed. It is clear there is only one contract. If there had been two contracts, the declaration should have contained two counts; and upon an application to a judge to strike out one of them, the plaintiff must have shewn that he bonâ fide intended to proceed on both. Mr. *Watson* suggests that there are two contracts, the one on the advertisement, or a laudatory contract, the other on the invoice. Upon looking at what passed at the trial, there is no pretence for saying that the plaintiffs were proceeding on two different contracts, but only on the contract contained in the invoice. They have incorporated in their declaration some of the qualities mentioned in the advertisement, but it turns out that the advertisement is not parcel of the contract. Those particulars therefore may be struck out, and the proper contract alone stand. I agree that the amendment is in a particular not material to the merits of the case. By the term "merits of the case," I understand the substantial merits of the case. Here the plaintiffs allege that there has been a contract, by which the defendant sold to them a certain quantity of coals, subject to the terms and conditions that the coal was fit and proper to be used in steam vessels, and they assign as a breach that the coal was not fit and proper for the use of steam vessels. Then the substantial merits of the case are, whether the coal was fit and proper to be used in steam vessels; the other qualities described in the advertisement are immaterial. The defendant might have

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been prejudiced by the amendment, if he could not have paid money into court; so that, if the judge had decided that the amendment should be made instanter, and the defendant had said that he was prejudiced on that ground, the judge would have postponed the trial. However, in consequence of the reservation of the point for the opinion of the Court, we are in a situation to do strict justice, provided we are satisfied that the amendment does not affect the substantial merits of the case. The next question is, whether there was any evidence to shew that there was in fact a variance, or whether there was no contract of the kind stated in the declaration; for if it should turn out that there was no contract for the sale of coal which would answer the purposes of steam navigation, but only of a particular article called "steam coal," the plaintiff could not succeed in this action. According to the case of *Chanter* v. *Hopkins*, that question depends upon the terms of the order; and I think that there is some evidence to shew that there may be a variance in the description, and not a total absence of contract. We ought not, therefore, to conclude the plaintiff from submitting the case to a jury.

ROLFE, B.—I do not altogether concur with the rest of the Court, but I quite agree with the last observation of my Brother *Parke*. If it turns out that the contract, as alleged, is not proved, and the plaintiff shews that there is in fact such a contract, though improperly stated, I think that we are at liberty to amend. But I own I have great difficulty in saying that the present objection is one for amendment. By the statute, the power of amendment is given in cases where there is a variance between the proof and recital of (amongst other things) a contract in any particular "not material to the merits of the case." That cannot mean *strictly* "not material to the merits;" for, in such case, it would be useless to amend. Some construc-

tion must be put upon those words, and, in my opinion, they mean not material to the *real merits* of the case. The statute goes on to say, "and by which the opposite party cannot have been prejudiced." I do not understand how any case can come within that provision, when, ex concessis, the party must have been prejudiced in his defence, since, in consequence of the amendment, he must make a new defence ab initio. It seems to me that the statute does not apply to such a case. I have stated the doubt which is raised in my mind, but as my learned brothers are of a different opinion, the rule will be absolute for a new trial.

PLATT, B.—The question is, whether the plaintiff can amend his declaration; and that depends upon whether the amendment is material to the substantial merits of the case, and is one by which the defendant could not be prejudiced in his defence. It seems to me that the amendment was not material to the substantial merits of the case, but only material to the form in which those merits should be brought before the jury. I do not agree with my Brother *Rolfe* in thinking that the defendant was in any degree prejudiced by the amendment. If he had been, he might, under the latter part of the section, have applied to the judge to postpone the trial. That being so, there were in this case two questions to be tried; first, whether the contract as alleged was entered into; and secondly, whether it was broken. If in fact the defendant made such a contract, and if upon the amendment the plaintiff would be entitled to recover, it seems to me, that, since the plaintiffs are restricted to one count, they ought, in common justice, to be enabled to put the real contract on the record.

Rule absolute.

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The trial of a cause at an assizes was postponed by order of nisi prius, on payment by the defendant of the costs of the day, "to be taxed." The defendant died before any verdict in the cause, and before the order of nisi prius was made a rule of court. The suit having abated, (17 Car. 2, c. 8, s. 1), the Court discharged a rule calling on the defendant's executrix to shew cause why the costs should not be taxed; the remedy for recovering the costs under 1 & 2 Vict. c. 110, s. 18, not being clear as against an executrix.

HILL *v.* WILLIAM FREDERICK BROWN.

LUSH had obtained a rule, calling on Mary Brown to shew cause why the plaintiff's costs of the day should not be taxed, pursuant to an order of Nisi Prius. It appeared from the affidavits, that the action was in tort; and on the 9th of July, 1846, an order of Nisi Prius was made at the Hertfordshire assizes to postpone the trial, on payment by the defendant of the costs of the day "to be taxed." The defendant died on the 14th of that month, leaving Mary Brown his wife and executrix. On the 5th of November, the order of Nisi Prius was made a rule of court. The Master declined to tax the costs; and a judge's summons, calling on Mrs. Brown to shew cause why the taxation should not take place, had been dismissed at chambers with costs.

Petersdorff shewed cause for Mrs. Brown.—This rule is intitled "John Hill *v.* William Frederick Brown." Now, as Brown died before any verdict had been given, no such suit now exists. How can Mrs. Brown, who is not a party to the suit (*a*), be called on to pay costs of the day on account of her testator, the defendant, not having proceeded to trial? If a party to a cause dies before the commission day of the assizes at which it is to be tried, the suit does not abate (*b*); but if, after that day and before verdict, he dies, which is this case, the suit abates by the express provision of 17 Car. 2, c. 8, s. 1. Though the order of Nisi Prius to pay costs of the day could have been enforced by attachment against the defendant had he survived, it is by

(*a*) *Hayward* v. *Giffard*, 4 M. & W. 194; *Evans* v. *Rees*, 2 Q. B. 334.

(*b*) *Jacobs* v. *Miniconi*, 3 Bos. & P. 149.

no means clear that he could have been sued upon it, as on an agreement to pay them (*a*).

Lush, in support of the rule.—The plaintiff seeks taxation of the costs, as a preliminary essential to his enforcing the order of Nisi Prius, by which the deceased defendant agreed to pay them. [*Parke*, B.—No such taxation could take place, unless Mrs. Brown had been a party to the order of Nisi Prius.] The abatement of the suit by the defendant's death did not cancel or affect the order made in his lifetime. The plaintiff seeks to tax the costs, in order that he may then consider his remedy by action or scire facias, or under 1 & 2 Vict. c. 110, s. 18, by which he has a remedy for these costs as a judgment creditor, in respect of the rule of court. The taxation merely ascertains the amount of costs payable; but the plaintiff's right to them dates from the time of making the order of Nisi Prius, which was in the defendant's lifetime, viz. before the suit had abated.

POLLOCK, C. B.—The plaintiff relies on the order of Nisi Prius, for payment of costs "to be taxed." That order, however, was never an order of this Court in the defendant's lifetime. Unless the plaintiff could shew what course should be taken to recover the costs taxed, so as to shew us clearly the result of making this rule absolute, it ought to be discharged.

PARKE, B.—The order of Nisi Prius was not made a rule of this Court till after the action had abated by the defendant's death. The remedy by attachment was taken away by that event. Though there may be a remedy against the defendant's personal representative, we ought not to order taxation of costs, unless we could see clearly that the

(*a*) See *King* v. *Clifton*, 5 T. R. 257, cited by *Maule*, B., 5 M. & W. 167.

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plaintiff would have a remedy for recovering them under 1 & 2 Vict. c. 110, s. 18, or otherwise.

ROLFE, B.—It may be that the order of Nisi Prius, which has been made a rule of this Court after the party's death, may constitute a judgment; but no case shews that the order of Nisi Prius amounted to an implied undertaking by the defendant to pay the costs (*a*).

PLATT, B.—The order of Nisi Prius could not be enforced under the statute till made a rule of this Court. That was after the suit had abated.

Rule discharged with costs.

(*a*) See *Pugh* v. *Kerr*, 5 M. & W. 164: 6 M. & W. 17; 1 B. & C. 651; 2 N. R. 473.

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MEREDITH *v.* HOLMAN (*a*).

Stat. 1 & 2 Will. 4, c. lxxvi, s. 54, directs carmen of waggons, &c., in which coals are carried in sacks for delivery to purchasers in London, &c., to weigh, if required, each sack "with the coals therein, and afterwards to weigh in like manner each sack without any coals therein:" —*Held*, that to weigh each sack of coals in one scale against weights in the other scale equal to the proper weight of a sack of coals, together with an empty sack, is not a legal weighing within the act.

The same act (s. 47) required a seller's ticket to be delivered to the purchaser of coals, imposing a penalty of not exceeding £20 on neglect, and (s. 77) enacted, that all penalties not exceeding £25 should be levied and recovered before any justice or justices of the peace. Stat. 1 & 2 Vict. c. ci, repealed so much of the act of 1 & 2 Will. 4 as related to the delivery of a seller's ticket, and proceeded by a new enactment (s. 3) to require a certain form of a seller's ticket to be delivered, under a penalty not exceeding £20, but did not subjoin any provision for recovering the penalty by any individual:—*Held*, that no action could be maintained for this penalty by the buyer of coals, where no seller's ticket was delivered.

DEBT on 1 & 2 Will. 4, c. lxxvi, (local), for penalties. —The declaration stated, that, after the passing of 1 & 2 Will. 4, c. lxxvi. (*b*), and within three calendar months

(*a*) See *Collins* v. *Hopwood*, 15 M. & W. 459.

(*a*) By 1 & 2 Will. 4, c. lxxvi, s. 48, all coals not delivered in bulk are to be delivered in sacks, each containing either 112 lbs. or

before the commencement of the suit, to wit, on &c., the plaintiff ordered and purchased of the defendant, and the defendant then agreed to sell to the plaintiff, a certain quantity of coals, to wit, four tons of coals; and thereupon afterwards, and within three calendar months next before the commencement of this suit, the defendant, under and in pursuance of the said order and purchase of the plaintiff, and agreement to sell of the defendant, and as the seller of the said coals, sent to the plaintiff, from a certain wharf and place within the distance of twenty-five miles from the General Post-office in the city of London, divers, to wit, forty sacks of coal for delivery thereof to the plaintiff as the purchaser thereof, with a paper or ticket addressed to the plaintiff, and purporting to give him notice that he was

224 lbs. By sect. 52, the carman is compelled to carry a weighing-machine in the cart &c. By sect. 54, "the carman or driver of any cart, waggon, or other carriage in which coals shall be carried in sacks, for delivery to the purchaser or purchasers thereof from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the Post-office aforesaid, shall and he is hereby directed to *weigh*, if he shall be required so to do, *any one or more of the sacks* contained in any such cart, waggon, or other carriage which may be chosen by the purchaser or purchasers of the said coals, or his, her, or their servant or servants, or other person or persons acting on the behalf of such purchaser or purchasers, *with the coals therein, and afterwards to weigh in like manner such sack without any coals therein.*

By sect. 47, a seller's ticket was required to be sent with certain quantities of coals, and to be delivered to the purchaser &c., imposing a penalty upon neglect not exceeding £20. [But see new provision, infra.] Sect. 77 enacts, "that all fines, penalties, or forfeitures by this act, or by virtue of the powers and authorities thereof, imposed (the manner of levying and recovering whereof is not hereby otherwise directed), not exceeding £25, shall be sued for within one calendar month after the offence or offences committed; and all such fines, penalties, &c., shall be levied and recovered before any justice or justices of the peace" &c.

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to receive therewith four tons of coals in forty sacks, containing 224 lbs. of coal in each sack, and signed by the defendant as seller of the said coals, and the said coals were then caused to be carried by the defendant, as the seller thereof, from the said wharf or place, in the said sacks, in a certain waggon, with a certain weighing-machine, as required by the statute in such case made, under the care, government, and direction of a certain carman, named &c., to the plaintiff as the purchaser thereof, and the same were then so sent and caused to be carried as aforesaid, as and for the said four tons of coal so ordered and purchased by the plaintiff of the defendant, and agreed to be sold by the defendant to the plaintiff, and each of the said forty sacks were so sent and caused to be carried as and for a sack containing 224 lbs. of coal; and thereupon then, and within three calendar months next before the commencement of this suit, the plaintiff, so being and as such purchaser, required the said carman to weigh one of the said sacks contained in the said waggon with the coals therein, which the said carman then did, and the plaintiff then found the coals therein to be deficient in weight, to wit, of less weight than 224 lbs.; and the plaintiff then signified to the said carman his desire to have all the coals in the said waggon weighed in the presence of a constable, police-officer, or other indifferent and credible person; and the plaintiff then procured the attendance of an indifferent and credible person, that is to say, R. B., to be present at the weighing of the said coals; and the said R. B., so being and as such indifferent and credible person, was present at the weighing of the said coals; and divers, to wit, thirty-two of the said sacks, both with and without the coals therein, were then weighed by the said carman with the said machine in the presence of the plaintiff, so being and as the purchaser of the said coals, and of the said R. B., so being and as such indifferent and credible person; and upon the said weighing, divers, to wit, thirty-two of the said sacks,

did not contain 224 lbs. net of coal each, but on the contrary thereof, each of the said thirty-two sacks contained less than 224 lbs. net of coals, to wit, &c., and no more.

Second count.—And whereas also, after sixty days after the passing of the 1 & 2 Vict. c. ci. (*a*), and within three calendar months before the commencement of this suit, to wit, on &c., the plaintiff bought of the defendant, and the defendant then sold to the plaintiff, a large quantity of coals, exceeding 560 lbs., to wit, four tons; and whereas the

(*a*) Stat. 1 & 2 Will. 4, c. lxxvi, is continued by 1 & 2 Vict. c. ci, except so far as it is altered by that act.

Sect. 2 of 1 & 2 Vict. repeals so much of 1 & 2 Will. 4 as relates to the sending and delivery of the seller's ticket; and by sect. 3 enacts, that, with any quantity of coals exceeding 560 lbs., delivered from and after sixty days after the passing of this act, by any cart, waggon, or other carriage, within the cities of London and Westminster, or within the distance of twenty-five miles from the Post-office aforesaid, the seller or sellers thereof shall deliver, or cause to be delivered to the purchaser or purchasers thereof, or to his or their agent or agents, or servant or servants, immediately on the arrival of the cart, waggon, or other carriage in which such coals shall be sent, and before any such coals shall be unloaded, a paper or ticket, according to the form in Schedule A, to this act annexed, and, in case any such seller or sellers do not deliver, or cause to be delivered, such paper or ticket as aforesaid to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, servant or servants, before any part of such coals is unloaded, every such seller shall for every such offence forfeit and pay any sum not exceeding £20, and, in case the carman, driver of, or other person attending any such cart, waggon, or other carriage laden with any such coals, to whom any such paper or ticket shall have been given by, or by the orders of, the seller, in order to be delivered to the purchaser, shall (having so first received the same from the seller, or any person by direction of the seller) refuse or neglect to deliver such paper or ticket to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals shall be unloaded, such carman, driver, or other person so offending, shall for every such offence forfeit and pay any sum not exceeding £20.

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defendant afterwards, and after the said sixty days, and within the said three calendar months, to wit, on &c., as such seller, delivered to the plaintiff, so being and as the purchaser thereof, the last-mentioned quantity of coals so exceeding 560 lbs. of coal by a certain waggon, at a certain place within the distance of twenty-five miles from the General Post-office, in the city of London, and then and there unloaded the last-mentioned coals for the plaintiff into and at the messuage and cellar of the plaintiff; but the defendant, so being and as such seller, did not immediately on the arrival of the said cart in which the last-mentioned coals were so sent as last aforesaid, and before any of such coals were unloaded, or at any time before or since, deliver or cause to be delivered to the plaintiff, so being the purchaser thereof, or to his agent or agents, servant or servants, a paper or ticket, according to the form in schedule A. to the last-mentioned act of Parliament annexed, but wholly neglected and refused so to do, whereby the defendant forfeited for his last-mentioned offence a sum not exceeding £25, to wit, £20, and thereby &c.

Plea, not guilty (by statute).

At the trial before *Platt*, B., at the sittings for Middlesex in last Michaelmas Term, it was proved that the coals had been weighed by putting each sack, with the coals in it, into one scale of the weighing-machine, and two weights, weighing 56 lbs. each, and an empty sack, in the other scale. The jury found, on the first count, that thirty-two sacks were deficient in weight; and in answer to the learned Baron's question, fixed the aggregate of the penalties at 1*l.* 12*s.* On the second count, they found a verdict for the plaintiff, and fixed the penalty at £10. The learned Baron gave leave to the plaintiff to move to increase the damages, and to the defendant to move to enter a verdict for himself on the first count, on the ground of the penalties having been assessed at a sum less than £25, and

of the weighing the coal having been contrary to the statute.

A rule was obtained in Michaelmas Term by *Montagu Chambers*, calling on the plaintiff to shew cause why the verdict for the plaintiff on the first count should not be set aside, and a verdict entered thereon for the defendant, and why the judgment for the plaintiff on the second count should not be arrested; and *Martin*, on the part of the plaintiff, obtained a cross rule to increase the damages.

Martin and *Gray* now shewed cause against the defendant's rule.—They admitted that, as the mode of weighing adopted was not that required by the act of 1 & 2 Will. 4, the defendant was entitled to a verdict on the first count. But as to the second count, founded on 1 & 2 Vict. c. ci, s. 3, they said that, as that act gave no jurisdiction to justices, or limited the right to bring actions, as the act of William had done, the plaintiff was entitled to recover on that count.

M. Chambers, contrà.—The second count avers, that, by force of the statute in such case made, the defendant forfeited for his last-mentioned offence a sum not exceeding £20. Then, if the first statute is incorporated in the later act, the penalty should have been proceeded for before a justice, under sect. 77 of the statute of Will. 4. If, on the other hand, it is not so incorporated, nothing in the later act authorises the suing for a penalty by action.

PARKE, B.—The second count cannot be supported; for the act of Victoria repeals part only of the act of 1 & 2 Will. 4, and enacts a new provision respecting the seller's ticket, affixing a penalty for its infringement, without specifying who is to sue for that penalty. Then, if no

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power to sue for it is given to any individual, the Crown only can proceed (*a*).

PER CURIAM.—(*Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.)

The defendant's rule made absolute.
The plaintiff's rule discharged.

(*a*) Viz. in a court of revenue, as for a debt to the Crown; see *Rex* v. *Malland*, Stra. 828. Quære, whether the acts of Will. 4 and Vict. are so incorporated, that the new penalty provided by the latter act can be recovered before justices under sect. 77 of the former.

April 16.

The MIDLAND GREAT WESTERN RAILWAY COMPANY (Ireland) *v.* GORDON.

A holder of scrip certificates for shares to be allotted at a future time by a contemplated railway company, executed the subscribers' agreement under seal, and sold his scrip in the market. An act of Parliament was afterwards obtained for making the railway, and his name was registered as a shareholder by the company without his sanction:—*Held*, that, till the name of the vendee of the shares was registered as the holder of them, the original holder was liable for calls made on them after their sale.

The subscribers' agreement was for forming a company to make a railway "from D. to M., and thence to A.," and authorised the directors to do all the transactions necessary for forming "a railway from D. to M. and A." It also bound the subscribers to submit to such regulations as might be imposed by the legislature. The act afterwards obtained empowered the company to buy and work a canal from M. to A., and to make a railway from D. to M. only, and incorporated the Companies' Consolidation Act, 8 Vict. c. 16:—*Held*, that the undertaking sanctioned by the act was not so different from that pointed out in the subscribers' agreement as to save the subscribers from being bound by it.

DEBT.—The action was brought under the Companies Clauses' Consolidation Act, 8 Vict. c. 16, for calls alleged to be due from the defendant, as a shareholder of the Midland Great Western Railway Company. Pleas: 1. nunquam indebitatus; 2. that the defendant was not nor is a holder of shares in &c. The cause came on for trial before *Rolfe*, B., at the last Assizes at Liverpool, and the following facts were proved for the plaintiffs:—In 1844 a prospectus issued for forming a company to construct a railway from Dublin to Mullingar, and thence to Athlone. On the 21st October, 1844, the defendant signed the subscribers' agreement, which was by deed under seal, alleging that the company's capital was to

be £1,000,000, and to consist of 50,000 shares of £20 each. It authorised the directors to apply to Parliament for an act, and to do all that was necessary for forming a railway from Dublin to Mullingar, and thence to Athlone. The subscribers also stated their agreement with each other to submit to all such regulations as might be imposed by the legislature. Scrip certificates for shares were then issued by the company, and sold in the share market. The defendant held ten of these certificates, and on the 28th October, 1844, sold them bonâ fide in the market. In 1845, the company sought for and obtained the act 8 & 9 Vict. c. cxix; by sect. 3 of which the railway was to extend only to Mullingar. By sect. 31 they were authorised to purchase a certain canal, called the Royal Canal, for connecting the Liffey and Shannon by way of Athlone, and to work the same. By the same act, the Companies Clauses' Consolidation Act (8 Vict. c. 16) was to be incorporated with and form part of it; and by sect. 8 of the special act it was provided, that every one who should have subscribed to the undertaking, or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder. The 52nd section of the special act empowered the company to make calls "upon the respective shareholders;" and by s. 59, if such calls were not paid they might sell the defaulters' shares. The calls for which the defendant was sued were made after the date at which he sold his scrip certificates for shares. The defendant's name was inserted by the company on the register of shareholders without his consent or communication with him. Upon this evidence it was contended for the defendant, that he was not liable to the plaintiffs for calls, on two grounds; first, that he was not a shareholder; secondly, that his subscription was to an undertaking of a different kind from that for which the act was eventually passed. *Rolfe*, B., directed a verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit.

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Martin now moved according to the leave reserved.—First, this defendant executed the subscribers' agreement, but is not a shareholder within sect. 52 of the special act. By sect. 59 of that act, the remedy for default to pay calls is by sale of the shares. Now, by sect. 22 of the Companies Clauses' Consolidation Act, 8 Vict. c. 16, the company was empowered to make calls on *shareholders*, who are to pay them accordingly; thus making a distinction from the preceding section 21, which provided that *subscribers* must pay the money subscribed. Therefore, after sale of the scrip certificates on the 28th October, 1844, the defendant had ceased to be a "shareholder" liable to future calls. That liability, under the acts, then shifted to the vendee. If he does not pay, the company, by the special act, may sell the shares. Parliament must be taken to have known that scrip certificates had been issued for the purpose of transfer, and had been transferred accordingly before the act passed. In *The London Grand Junction Railway Company* v. *Freeman* (*a*) that principle is assumed by the Court. In that case, nine months after the date of the scrip certificates for shares, they were brought in to the company's office by the defendant, indorsed with his name and address, and there exchanged for receipts. These scrip certificates were then immediately entered on the register, the entry describing the defendant as the proprietor of —— shares. A sealed ticket was made out according to the entry. The defendant never called for the shares. One White was the original proprietor of the scrip; his address was known at the company's office; no call was made on him, and no act of transfer by him to the defendant appeared. The Court, notwithstanding, held the defendant liable to pay calls in respect of the shares, he being the existing holder of the scrip, according to the register, and as such entitled to the shares. [*Parke*, B.—In this case the company had a right

(*a*) 2 M. & Gr. 606; 2 Scott, N. R. 705, S. C. See 1 Q. B. 256, 271.

to register the original subscriber. All that the purchaser took by the sale to him of the scrip certificates for shares was an equitable right to have his name entered on the register as a shareholder. If he so registers his name, then he is the shareholder, and the liability of the original shareholder ceases, but till he does so it continues. That is perfectly consistent with the case cited. We cannot grant a rule on this point.] Next, the defendant subscribed to an undertaking entirely different from that for which the act on which the plaintiffs rely was afterwards obtained. That undertaking to which the defendant subscribed was for making a railway from Dublin, viâ Mullingar, a petty place, to Athlone, an important centre of traffic; so that a scheme for making a railway to stop short at Mullingar was of an entirely different nature. Nor did he contemplate the buying or working a canal to Athlone. [*Rolfe*, B.—Suppose a railway company to vary its intended course, by going round side B. of a field instead of side A. of it, as originally intended—can that entitle a subscriber to throw up his contract?] So slight a deviation is not a sufficient test by which to try that which is here in question. Suppose the legislature, instead of limiting the railway line to Mullingar, had extended it to Belfast, could the defendant have been bound by his subscription? [*Pollock*, C. B.—The legislature accedes to a bonâ fide application for powers to carry certain purposes into effect, but adds, you must also do so and so; is not that part of the terms on which the act is obtained from them? Can it be said that the undertaking here authorised by them is entirely different from that to effect which the defendant had before subscribed? Had the company obtained an act for improvements near London, or out of Ireland, that would have been a different undertaking.] The subscribers could not interfere. [*Parke*, B. —They might have been heard in the Parliamentary committee. *Platt*, B.—Do you tell us who are the subscribers to the undertaking contemplated by the act?] There are

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no such subscribers; for sect. 21 of the Companies Clauses' Consolidation Act, 8 Vict. c. 16, which makes *subscribers* to the undertaking liable, cannot extend to make them responsible for the undertaking set out in the subscribers' contract, for no means for carrying that contract out are provided by the act.

POLLOCK, C. B.—The question here is one of identity; viz., whether the undertaking subscribed by the parties who originally contemplated it is identical with that afterwards sanctioned by the legislature. As the original undertaking can in this case be easily identified with that afterwards embodied in the act of Parliament, we need not go so far as to say that the subscribers would be bound by an application to Parliament by their directors for any other undertaking.

PARKE, B.—The only question here is, whether the defendant subscribed to the undertaking sued on. Now he clearly is such subscriber. That is all on which we need decide. Besides, under the general discretion to apply to Parliament, given by the subscribers to the original undertaking to their directors, the subscribers must take what Parliament will give, and are bound by it accordingly if the act pass. Even if, on application of the directors, Parliament by its act sanctions another undertaking, I should have a strong opinion that the original subscribers would be bound by it. Can it be said that the power to buy the canal may not be valuable for the purpose of bringing traffic to the railway?

ROLFE, B.—The railway originally intended is identified as far as Mullingar. Probably there was no capital to carry it further.

PLATT, B., concurred.

Rule refused.

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April 16.

A judge's order made under 6 & 7 Vict. c. 73, s. 43, after taxation of an attorney's bill, ordering judgment to be entered up for the amount found by the Master's allocatur, has the same effect as a rule of court made for payment of money under 1 & 2 Vict. c. 110, s. 18. Accordingly, if, after such an order, an action is brought for the amount of the taxed costs, the costs of the writ, &c. will be disallowed.

THE plaintiff was an attorney, and his bill had been delivered to the defendant, and afterwards taxed. The Master's allocatur was given for 23*l.* 9*s.* 4*d.* By 6 & 7 Vict. c. 73, s. 43, it is enacted, that, upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court or any judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such order thereon as such court or judge shall deem proper. The plaintiff accordingly obtained a judge's order, authorising him to sign final judgment for the amount of costs thus taxed. He then issued a writ against the defendant for the amount, filed a declaration, and entered an appearance for the defendant, before entering up judgment under the judge's order. The Master disallowed the costs of the writ, declaration, and appearance.

Atherton moved for a review of this last taxation.—The question is, whether, under the terms of the above enactment, an attorney who has obtained a judge's order to sign final judgment in an action for his taxed costs, can do so without founding such judgment on a writ, declaration, and appearance, as preliminary steps necessary to that proceeding. The practice is not settled.

POLLOCK, C. B.—The words of the act shew that the

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judge's order is to operate as a judgment; so there can be no rule. This apparatus was unnecessary.

PARKE, B.—The judge's order is to have the effect of putting the Master's allocatur on the footing of a rule of court for the payment of money under 1 & 2 Vict. c. 110, s. 18. Then there was no occasion for these proceedings.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

May 4.

SHAW and Others *v.* ROWLEY and Another.

Assumpsit for the price of shares in a railway company. The declaration averred, that the plaintiffs were ready and willing to transfer the shares. Plea, that plaintiffs were not ready and willing to do so. On 15th October, 1845, defendants bought from plaintiffs, in the Manchester share market, 100 railway shares, to be paid for on 31st October. On the 14th of October a call had been made on the shares. By the custom of that market the deed of transfer was to be prepared by the vendor. On 1st November plaintiffs applied to defendants for a name to be inserted in the deed as buyer. No name was furnished, and defendants afterwards refused to accept the shares when tendered to them. Plaintiffs had not paid the calls on the shares. By 8 Vict. c. 16, s. 16, no shareholder can transfer his share till he has paid all calls due on it:—*Held*, that plaintiffs were entitled to recover the price of the shares, for they were in a condition to make a transfer of them, by paying the calls on or before 31st October, had the defendants furnished them with a name of the transferree.

Per *Parke*, B., a circular letter sent to every shareholder in a railway company, informing him that the directors had resolved on making a call, constitutes the call.

ASSUMPSIT. The declaration stated, that, after the passing of a certain act of Parliament, for making a railway from Oxford to Worcester and Wolverhampton, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, 100 shares in the Oxford, Worcester, and Wolverhampton Railway Company, at £16 per share, and that the plaintiffs were ready and willing to transfer the said shares to the defendants, yet the defendants would not accept the said shares or pay for the same. Pleas: 1. non-assumpsit; 2. that the plaintiffs were not ready or willing to transfer the said shares.

The cause was tried before *Wightman*, J., at the Yorkshire Summer Assizes in 1846, when the following facts were proved:—On the 14th October, 1845, the defendants

ordered a Mr. Dyson, a sharebroker at Leeds, to buy for them 100 shares in the Oxford, Worcester, and Wolverhampton Railway Company. On the 15th the shares were bought at Manchester by a broker of that place, from the plaintiffs, at £16 each (*a*), to be paid for on the 31st, the settling day for railway shares. By the custom of the Manchester share market, the deed of transfer of the shares, requisite under 8 Vict. c. 16, s. 14, was to be prepared by the seller; and on the 1st November the Manchester broker applied by letter to Dyson for the name of the buyer. Dyson sent the letter to the defendants, who on the 7th November refused to give the name of a buyer, or take the shares. They had fallen much in value in the interval. On the 15th November a formal tender of the shares was made to the defendants on the plaintiffs' behalf, but the defendants refused to take them. The defendants rested their objection to take the shares on the following grounds:—On the 14th October, the day of the order by the defendants of the shares, a resolution passed at a board of directors of the railway company, for making a call of 10*l.* a share, payable on or before the 10th November, and on the same day notice of it was given by letter to each shareholder, but the plaintiffs did not pay the calls due on the shares in question. The Companies Clauses Consolidation Act, 8 Vict. c. 16, enacts, by sect. 16, that no shareholder shall be entitled to transfer any shares after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him. Upon this enactment, it was contended that the plaintiffs had not enabled themselves to transfer the shares, so that the defendants were entitled to a verdict on the second issue. *Wightman*, J., acceded to this view, and directed

(*a*) Consisting of 2*l.* 10*s.* paid, and 13*l.* 10*s.* premium.

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the jury accordingly. Verdict for the defendants on th second issue, and for the plaintiffs on the first, with leave t them to move to enter a verdict for 750*l.* on the other issu

In Michaelmas Term, 1846, *Martin* obtained a rule a cordingly, on the ground that the defendants, as vendee were bound to have paid the call.

Knowles, Baines, and *Farrer* shewed cause in the presen Term (April 29).—The defendants are entitled to retain th verdict; for the averment that the plaintiffs were "ready an willing" to transfer the shares is not satisfied, unless they, o the 31st October, were ready and *able* so to transfer as to ves the property legally in the vendees: *Hibblewhite* v. *M'Ma rine* (*a*). As there was evidence in this case of the custom c the Manchester share market, for the seller to prepare th conveyance to the buyer, *Stephens* v. *De Medina* (*b*) does no apply. [*Parke,* B.—No doubt readiness to convey woul include capacity to do so.] So that, as on the 31st Octob the plaintiffs had not paid the call made on the 15th, the were not in a position to transfer the shares to the defend ants under 8 Vict. c. 16, s. 16. It will be contended th no call existed on the 31st October, the day when th shares ought to have been transferred, nor was in fact mad till the day on which it was payable, viz. the 10th Novem ber. [*Parke,* B.—Can the call be taken to be made ti notice of it is given to the shareholders?] This questio at what point of time the call may be said to be made, i. completed, is not decided, though it arose incidentally i *Sheffield and Manchester Railway Company* v. *Woodcock* (c and *The Great North of England Railway Company* v. *Bi dulph* (*d*). But the case of *Aylesbury Railway Company* v *Thompson* (*e*) shews that the persons appearing on the com

(*a*) 6 M. & W. 200; see 9 M. & W. 820.
(*b*) 4 Q. B. 422.
(*c*) 7 M. & W. 574.
(*d*) 7 M. & W. 242.
(*e*) 10 Law J., N.S., Q.B., 124 2 Railway Cases, 688.

pany's books to be proprietors of the shares at the time the calls were resolved on, are liable to pay them to the company; nor is that decision overruled in *Aylesbury Railway Company* v. *Mount* (*a*). [*Parke*, B.—The buyers would not give the sellers a name to be inserted as buyer in the necessary deed of transfer. Then were the plaintiffs bound to tender such transfer to the defendants?] Had the defendants paid the calls, the company could only have treated them as agents for the plaintiffs, the sellers. The resolution of the directors, on the 14th October, to make the call, is the call. [*Rolfe*, B.—We decided the other way in *Newry and Inniskillen Company* v. *Edmunds and Harris* (*b*).] At all events, the call was in this case completely made when the notice of it was given to each shareholder, which was done on the same day on which the resolution passed.

Martin and *Cleasby*, contrà.—This question has never arisen between vendor and vendee of shares. No advertisement in a newspaper that a call had been made would constitute the call, or be more than notice of it. However, it may in this case be conceded that a call had been resolved on by the directors, and a notice of that resolution had been sent round to each individual shareholder. [*Parke*, B.—That fact made up the call in this case; so it was made before the defendant was bound to fulfil his contract, and before the settling day had arrived.] The true question remains, viz. whether the plaintiffs had omitted anything which by this contract they ought to perform. Now it is submitted, that by that contract the defendants were bound to pay the calls, and the plaintiffs were ready and willing to transfer the shares as soon as by that payment they were placed in a condition to do so. The plaintiffs had capacity

(*a*) 4 M. & Gr. 651; 5 Scott, 127; 8 Scott, (in error), 586.

(*b*) Exch., 22 and 23 April, 1847. These cases were not finally disposed of till the sittings after Hilary Term, 1848, and will be reported in the Exchequer Reports, vol. 1.

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to do all which by law they were bound to do towards the transfer of the shares: *Humble* v. *Langston* (*a*). The vendor cannot himself transfer, he can only execute the deed. [*Parke*, B.—No name of the person to whom the shares were to be transferred was given within the time at which the plaintiffs were bound to be ready to transfer, viz. by the 31st October.] First, the decision in the *Aylesbury Railway Company* v. *Thompson* does not apply; for in that case there was an express enactment that the vendor was to remain liable to the calls, nor had any memorial been registered according to the particular act. Next, 8 Vict. c. 16, s. 16, clearly explains the case. That enactment was intended merely for the benefit of the company, to prevent disputes whether the call should be paid by the vendor or vendee: and sections 14 and 15 shew that it is not the mere execution of the deed by the vendor that constitutes the transfer. [*Parke*, B.—It is clear that the deed of transfer must be brought in an executed state to the secretary, and sect. 16 does not say that no such entry of the memorial, as in sects. 14 and 15 directed, shall be made in the register of transfers, but that no shareholder shall be entitled to transfer any share after call made in respect thereof till he has paid the same. We must abide by the grammatical construction, unless it is shewn to be unreasonable. The question is, what implied addition do the plaintiffs seek to make to this contract? Their argument is, that no more is required by the act than that all calls should be paid before the transfer is registered, and all the party transferring has to do is to tender the conveyance as soon as he is enabled to insert the person to whom the transfer is to be made, by getting his name from his broker. *Platt*, B.—The plaintiffs might have stipulated for the price and the call to be paid.] The defendants' contract means, that they will pay for all liabilities accruing on these shares. The plaintiffs say, that as the defendants

(*a*) 7 M. & W. 517.

have not paid the identical £5, they were bound to pay to the company, they have not performed the contract. The plaintiffs' averment of readiness to transfer means that they were ready to do their duty in transferring to the defendants. It was admitted by the defendants that they were to pay the calls first or last. Then were they to come from the plaintiffs' pocket in the first instance? [*Pollock*, C. B. —The 16th section says, that no shareholder shall transfer any share till *he* shall have paid all calls; but you say that by this contract it was the duty of the defendants, as vendees, to go to the company, pay the calls, and then demand a transfer by the plaintiffs. But can it be said that the vendee is bound to pay the calls, so as to make a title, without acquiring such a lien on the shares as would prevent the vendor from selling to some one else, and leaving the original vendees to their mere right of action?] Sooner or later the vendee is to pay the call; and if, as is argued for the plaintiffs, the defendants contracted to buy the shares at a certain price, *together with* all further liabilities, that would bind them to pay the calls at the office. [*Parke*, B.—If payment of the call is a condition precedent to the transfer, then any transfer in fact without it would have no operation. Who is to advance the calls in the first instance? The vendor is to be ready with the deed of transfer, and may deliver it as an escrow. The question is, whether it is not sufficient for the vendor to be ready to convey the shares as soon as the buyer has cleared the way for him to do so by paying the calls. The plaintiffs say that the transfer of a share, in sect. 16, means transfer of the actual property.]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—We are of opinion that the rule should be made absolute to enter the verdict for the plaintiffs. It

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appears to us that they were perfectly ready to do all that they could be required to do, or could do at the time that they asked for the name of the purchaser, viz. on the 1st November, 1845. They were then as ready to perform what they had contracted for as they could be. It was not necessary that they should be in an actual situation to perform their contract, if they were able at the proper time to place themselves in that situation. Take a familiar instance:—If a man, having goods in bond, contracts to sell them, it is very clear that, if they are to be delivered in this country, he cannot so deliver them till he has paid the duty; but if the buyer of the goods refuses to perform the contract, and therefore the seller never pays the duty, but enters the goods for exportation, perhaps on account of having missed that opportunity of sale, it could not be said that he had no right to sue the vendee for that breach of contract, merely because he never was in the actual condition to deliver the goods, for he had it always in his power to place himself in that condition by paying the duty. So in this case, the plaintiffs had it in their power at any time, by paying the call, to transfer the shares. They asked for the name of the transferee before the day fixed for payment for the shares, and at that time were in a condition, by paying the call, to make an actual and binding transfer. It appears to us, therefore, that the defendants cannot now set up the mere impediment that arises out of the non-payment of the call, for it is agreed on all hands that it was ultimately to be paid by the defendants. The verdict must be entered for the plaintiffs.

Rule absolute.

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May 6.

WEEKS *v.* ARGENT.

By 5 & 6 Vict. c. 22, s. 40, the general issue may be pleaded, and that act and the special matter given in evidence, in defence of an action on a security given by a bankrupt with intent to persuade a creditor to forbear opposing or consent to the allowance of his certificate:—*Held*, that the general issue, non assumpsit (by statute), may be pleaded under this enactment in an action on a bill or note, notwithstanding Reg. Gen., Hil., 4 Will. 4, Pleadings in Assumpsit.

Where an act is done in pursuance of a bargain between two parties, and in presence of the attornies for each of them, the communication by one party to his attorney relating to that act, is not privileged, so as to prevent the attorney from giving evidence of it.

ASSUMPSIT on a promissory note, by the first indorsee against the maker.—The note was for £120, bearing date 12th February, 1845, payable to Clark or order at 12 months' date, and indorsed by him to the plaintiff. Plea, non assumpsit (by statute). This plea was founded on the stat. 5 & 6 Vict. c. 122, s. 40, which enacts, that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance or confirmation of such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence. The cause was tried before *Pollock*, C. B., at the Middlesex sittings after last Hilary Term. The defendant, Argent, was shewn to have become bankrupt in November 1844. On that occasion, Clark, a creditor of his on a bill, consulted Vallance, his attorney, as to the measures advisable for obtaining payment. Vallance advised him to get the note now sued on from the defendant. Accordingly, afterwards, the defendant, in the presence of his own attorney, as well as of Clark and his attorney Vallance, signed the note now sued on, and received the bill from Clark. The defendant obtained his certificate on the 12th March, 1845. In order to establish the defence under the above enactment, the counsel for the defendant called Vallance, the attorney for the payee, Clark. Vallance objected to give evidence, on the ground that his knowledge of the facts relating to the making the note had been obtained in his character as an attorney, and was therefore confidential. *Pollock*, C. B., having overruled the objection, it was contended for the

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plaintiff that, in an action on a promissory note, the plea of non assumpsit was bad under all circumstances, by Reg. Gen., Hil., 4 Will. 4, Pleadings in Assumpsit, r. 2, so that Vallance's evidence was not admissible. The Chief Baron, however, admitted the evidence. Vallance then proved that the note was given by the defendant to Clark, in consideration of his withdrawing all opposition to the defendant's passing his last examination and obtaining his certificate. The plaintiff had a verdict for the amount of the note and interest, leave being given to move to enter a verdict for the defendant.

Montagu Chambers having obtained a rule accordingly,

Humfrey and *Eastwood* now shewed cause.—The statute 5 & 6 Vict. c. 122, s. 40, never was intended to make legal that plea of non assumpsit in an action on a bill or note, which had been prohibited by Reg. Gen. Hilary Term, 4 Will. 4, having the force of a statute (*a*): *Donaldson* v. *Thompson* (*b*). [*Parke*, B.—Subsequently to the new rule, the statute 5 & 6 Vict. authorised the pleading of the general issue, which in this action could only be non assumpsit.] Secondly, Vallance became acquainted with the consideration for the note in his position of confidential adviser to the payee, Clark, and therefore was not compellable to give evidence on that subject: *Doe* d. *Strode* v. *Seaton* (*c*). This principle holds even in criminal cases: *Reg.* v. *Smith* (*d*). [*Platt*, B.—In *Reg.* v. *Smith*, the possession by the attorney of the note alleged to be forged by

(*a*) 3 & 4 Will. 4, c. 42, s. 1.

(*b*) 6 M. & W. 316. But, semble, this objection could only have been raised on special demurrer. *Hay* v. *Fisher*, 2 M. & W. 722.

(*c*) 2 Ad. & E. 171.

(*d*) Cor. *Holroyd*, J., Derby Summer Ass. 1822, reported 1 Phillipp's Evid. 171, 9th edit. See *Reg.* v. *Jones* or *Hayward*, 1 Denison, C. C. R. 166; 2 C. & Kir. 234, semb. contra.

his client was the client's possession. *Parke*, B.—Nor did the prosecutor offer secondary evidence of its contents. *Marston* v. *Downes* (*a*) shews, that, if a judge admits, though improperly, evidence of a professional adviser of a stranger to the suit, the party to the suit cannot avail himself of the objection.] It need not be here contended that secondary evidence could not have been given, for the evidence admitted was of the witness who himself negotiated the matter. [*Parke*, B.—The question is, whether he obtained the information in his character as an attorney, for he may have been consulted on matter not within his province as such, and would not then be privileged. *Rolfe*, B.—Suppose a man produces a forged deed to his attorney, and asks him to borrow money on it (*b*)? *Pollock*, C. B.—Suppose a man, being an attorney, is employed merely as an agent, or with another who could do the thing as well as an attorney—is his evidence inadmissible?] The question is, whether Clark consulted Vallance because he was an attorney, and in order to get his advice as to the debt due from Argent. [*Parke*, B.—In *Greenough* v. *Gaskell* (*c*), Lord *Brougham*, C., reviewed the cases on this subject, and laid down the rule which has since been adhered to. Lord *Tenterden* had entertained a more limited view, and confined the privilege to information imparted by the client to his attorney, either in the course of an action then existing, or with a view to it (*d*). But this communication was made in the presence of the defendant and his attorney; then how could it be confidential?] What took place then was

(*a*) 1 Ad. & El. 31.

(*b*) This seems to allude to *Reg.* v. *Farley*, 1 Den. C. C. R. 197; 2 C. & Kir. 313; and *Reg.* v. *Hayward*, 2 C. & Kir. 234; S. C., nom. *Reg.* v. *Jones and Others*, 1 Den. C. C. R. 166; also *Avery's case*, 8 C. & P. 596.

(*c*) 1 Mylne & Keen, 98. See cases collected in 1 Phil. Ev., 9th ed., 168, n. Lord *Brougham* had consulted *Tindal*, C. J., Lord *Lyndhurst*, C. B., and *Parke*, B.

(*d*) *Williams* v. *Mundie*, Ry. & M. 34.

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the giving of the bill by the defendant, in consequence of the confidential communication to Clark by his attorney, Vallance. [*Platt*, B.—Vallance was not the defendant's agent, so that nothing said or done at the time the note was given to Clark in exchange for the bill was confidential. But nothing seems to have been then said about the terms of the arrangement. *Parke*, B.—*Doe* v. *Seaton* does not shew that a bargain made with an opposite attorney in the presence of his client, a third party, or vice versâ, is a confidential communication within the rule of evidence.] In *Reg.* v. *Smith*, the note alleged to be forged had been already produced on another occasion before the trial, viz. before a magistrate and before the judge, yet the rule that it was a confidential communication prevailed. [*Parke*, B.—All that case decides is, that the possession of the attorney for the prisoner was the possession of the prisoner, so that if the prisoner did not suffer him to produce it, secondary evidence of it would have been admissible for the purposes of criminal justice.]

POLLOCK, C. B.—This rule must be absolute. In *Griffith* v. *Davies* (*a*), it was held that a person who had attended as attorney for the defendant, on an occasion when he proposed a compromise to the plaintiff, might be called to prove the conversation which took place between them. *Patteson*, J., there said, he did not see why the attorney should have been prevented from stating at the trial what his client had already communicated to the opposite party; the disclosure objected to being of something which had already been said to the plaintiff. That learned judge there said he could not understand the decision in *Gainsford* v. *Grammar* (*b*). Suppose the agreement between the parties had

(*a*) 5 B. & Adol. 502. See *Turner* v. *Railton*, 2 Esp. C. N. P. 475.
(*b*) 2 Camp. 9.

been reduced to writing, and this attorney had been the attesting witness, without the document being left with him, so as to make his possession that of his client—could not he have been called to prove the document?

PARKE, B.—A mere bargain with the other side, in the presence of the opposite attorney, is not a confidential communication, within the rule of evidence. In *Duffin* v. *Smith* (*a*), in an action on a bond, the attorney for the plaintiff was admitted by Lord *Kenyon* to prove that it was given for a usurious consideration. That case was decided long before the rule respecting privileged communications to an attorney received the extension it has since had.

ROLFE, B., concurred.

PLATT, B.—Was the communication made by Clark only to Vallance, his attorney? No.

Rule absolute (*b*).

M. Chambers and *Charnock* were to have supported the rule.

(*a*) Peake's C. N. P. 108.
(*b*) See *Shore* v. *Bedford*, 5 M. & Gr. 271, Hil. 1843.

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May 8.

Where a rule nisi obtained for a criminal information for a libel, in the Queen's Bench, is discharged on shewing cause, the applicant may bring an action in another Court for the publication of the same libel.

WAKLEY *v.* COOKE and Another.

CASE for libel. The plaintiff was a coroner of the county of Middlesex, and the defendants were proprietors of a periodical publication called the "Medical Times." The first count of the declaration set out the matter alleged to be a libel, which had been published in the "Medical Times," and was charged to be a libel on the plaintiff in his capacity of coroner. On the 12th November, 1846, the plaintiff had obtained a rule nisi for a criminal information against the defendants in the Court of Queen's Bench, for publishing this libel. That rule was discharged in Hilary Term, 1847, whereupon this action was commenced on the 18th February, and the declaration was delivered on 28th April, 1847.

Lush, on affidavit of these facts, had obtained a rule in this court for striking out the first count of the declaration; against which

Bramwell shewed cause.—The whole question is, whether the fact of an unsuccessful application for a criminal information against the publishers of a libel, is a bar to an action for the publication of the same libel.

POLLOCK, C. B.—No.

The Court then called on

Lush to support his rule.—First, the case of *Rex* v. *Sparrow* (*a*) shews that a party who applies for a criminal information undertakes by so doing not to adopt any other remedy for the cause of complaint on which he

(*a*) 2 T. R. 198, Hil. 1788.

so proceeds. In that case *Ashhurst*, J., said, that the Court, "after considering the point very fully, thought it proper to establish it as a general rule for the future, that where a person applies for an information, he is understood to waive his right to bring an action, unless the Court, on hearing the whole matter, should be of opinion that it is a proper subject to be tried in a civil action, and should specifically give him leave to do so." That case has been acted upon in many instances since in the Queen's Bench, and parties have been called on there to relinquish actions brought after applying for criminal informations. [*Pollock*, C. B.—Then an attachment might be applied for against this plaintiff in that court. *Rolfe*, B.—That is the remedy if the plaintiff is in contempt in the Queen's Bench on account of any breach of his undertaking, express or implied, in that court.] Next, it was a breach of faith to bring this action, and this Court will stay it on that ground, though the earlier proceedings were in another tribunal. In *Cocker* v. *Tempest* (*a*), *Alderson*, B., said, "The power of each court over its process is unlimited; it is a power incident to all courts, inferior as well as superior. Were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The power must be used equitably; but if it be made out that the process of the court is used against good faith, the Court ought to interfere to prevent it, for the purpose of administering justice." Here the plaintiff must be taken to have known the course of practice in the Queen's Bench, and by applying for a criminal information, to have undertaken that, if the Court will exercise their discretion on this matter as put by him in a criminal form, there should be no action.

POLLOCK, C. B.—This case cannot be put so high as is contended for by Mr. *Lush*, viz. that every man is taken to

(*a*) 7 M. & W. 502.

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know the practice of the Court of Queen's Bench. Though his ignorance of the law of the land will not avail him, it is common to relieve on terms from the consequence of ignorance of practice. The judges of the Queen's Bench, who alone possess the function of granting or refusing a criminal information, may lay down a rule to regulate their own proceeding in that matter, but I do not think that they can, by any such rule, bind the judges of another court, so as to prevent their entertaining an action brought in the ordinary way.

PARKE, B.—The Court of Queen's Bench did not give this plaintiff the relief he asked, so that the argument in support of the rule would exclude him from all remedy, because he had merely applied for other relief elsewhere, without obtaining it. The defendant cannot put this case higher than if the plaintiff had entered into a rule in the Court of Queen's Bench that no action should be brought in any other court, except by their sanction. The Court of Queen's Bench know the circumstances under which they refused the information: we are asked to stay the action, but cannot know that the action is not rightly founded. Then we ought not to interfere, except we see that the action has been brought against good faith. But the undertaking, if it is one, is entered into with the court of Queen's Bench, by tacit assent of the applicant for the criminal information at the time of so applying. That Court may think that the bringing an action in this court is a contempt, and a ground for granting an attachment there. But no tacit understanding that the practice of that court shall be complied with can authorise us to stay proceedings in an action brought in this court. I thought the rule laid down in *Rex* v. *Sparrow* had only applied in cases where a criminal information had been granted.

ROLFE, B.—The Court of Queen's Bench is supposed to have laid down a rule of practice, which they, knowing the

circumstances, would be competent to dispense with in the particular instance; whereas, if the rule were to be imperative on other tribunals to whom the facts are unknown, the strange anomaly would arise, that the prohibition to bring an action would be absolute in the other courts, but qualified in the Court of Queen's Bench.

PLATT, B.—Probably all that was intended by the rule laid down in *Rex* v. *Sparrow* was to prevent the oppression of a criminal and civil proceeding for the same cause of complaint, by enabling the Attorney-General to enter a nolle prosequi, if necessary.

Rule discharged; the costs to be costs in the cause (*a*).

(*a*) *Pollock*, C. B., cited Starkie on Slander, which states (1st ed. 599) that, in general, the applicant for a criminal information must waive his right of action; and adds, that this is an advantage derived by the defendant from this mode of proceeding; for, if convicted under an indictment, the prosecutor might still sue for damages.

MOUNTFORD *v.* HARPER.

(*Before* ALDERSON, B., *sitting alone*).

May 8.

The defendant having money of the plaintiff in his hands drew on his banker, in favour of the plaintiff a cheque, which was paid to the plaintiff at the bank:—*Held*, evidence of payment, without proof that the plaintiff had received the cheque from the defendant.

ASSUMPSIT for money had and received by the defendant for the plaintiff's use.

Plea (amongst others), payment before action brought.

At the trial, before the under-sheriff of Staffordshire, the following facts were proved. The plaintiff was the tenant of Mrs. Cunliffe Offley, whose steward the defendant was. A sum of money having been paid by the Grand Junction

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Railway Company to the defendant, to be handed over to the plaintiff, in respect of damage done to his interest as tenant, the defendant drew a cheque upon his bankers for £15, in favour of the plaintiff, which the latter presented for payment at the bankers', and received the amount. There was no evidence that the cheque had been given by the defendant to the plaintiff. It was objected on behalf of the plaintiff, that there was not sufficient evidence to prove the plea of payment, and that there should be some proof to connect the plaintiff with the receipt of the cheque. The under-sheriff was of that opinion, and directed a verdict for the plaintiff on the plea of payment, reserving leave for the defendant to move to enter a verdict for him.

A rule nisi having been obtained accordingly,

Bovill shewed cause.—The direction of the under-sheriff was correct. The mere payment to the plaintiff at the bank of a cheque drawn by the defendant in favour of the plaintiff, is not evidence that the money was paid by the defendant to the plaintiff. There ought to have been some evidence to connect the plaintiff with the receipt of the cheque. It may have passed through the hands of twenty persons before it came to him. In *Lloyd* v. *Sandilands* (a), it was held that the mere circumstance of a cheque being made payable to a person who received payment of it, was not evidence that the banker gave it to him. *Dallas*, J., there says—"Although the cheque is made payable to the defendant, yet it might have been given to a third person, and through that third person might have got into the hands of the defendant. The plaintiff and the defendant are not by this evidence connected with the cheque. This is not proof of payment."

Miller, in support of the rule.—It is conceded that proof

(a) Gow, 15.

of the delivery and payment of a cheque to a party is not sufficient evidence of a debt, unless it be shewn upon what consideration, and under what circumstances, the cheque was given: *Aubert* v. *Walsh* (*a*). But when a debt has been proved to exist, the cheque is evidence of payment. In *Egg* v. *Barnett* (*b*), Lord *Kenyon* ruled that a cheque drawn by the defendant on his bankers, and which appeared to have been received by the plaintiff, was evidence to go to the jury of the fact of payment. In *Boswell* v. *Smith* (*c*), where a cheque signed by B. was proved to have passed through the hands of A., *Tindal*, C. J., ruled that the delivery of the cheque was primâ facie evidence of payment. So here, the defendant having proved that the cheque had been paid to the plaintiff, and that he had the defendant's money in his hands, it was incumbent on the plaintiff to shew in answer that the cheque had not been given by the defendant to him, but to another person.

ALDERSON, B.—The rule must be absolute. In the case of *Lloyd* v. *Sandilands*, where *Dallas*, C. J., says, that "the fact of a cheque being made payable to the defendant, and the defendant having received payment of it, is not proof of *payment*," the word "payment" is incorrectly used for "debt." There the cheque was given in evidence for the purpose of enforcing an alleged debt, not as proof of payment. That was the only case which embarrassed me; all the other authorities are clear.

Rule absolute.

(*a*) 4 Taunt. 293. (*b*) 3 Esp. 196.
(*c*) 6 C. & P. 60.

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May 8.

A plaintiff brought separate actions against two joint contractors, one of whom paid £300 into court, and the plaintiff, without replying in that action, gave notice of trial in the other. The Court allowed the defendant in this latter action, on payment of costs, to insert on the record a plea of payment into court of £300, without actually paying in the same.

RENDEL and Another *v.* MALLESON.

(*Before* ALDERSON, B., *sitting alone.*)

THIS was a rule calling on the plaintiffs to shew cause why the proceedings in this action should not be stayed until the determination of the cause of *Rendel and Another* v. *Tabor*, unless the plaintiffs would consent to give credit for the sum of £300, paid into court in that action, as though paid into court in this action, or otherwise give the defendant in this action the benefit thereof, and agree to proceed in this action only for such further sum as might be due to them from either or both the defendants in the two actions; the defendant in this action undertaking, if the plaintiffs elected to proceed in the action against the defendant Tabor, that, if any sum were recovered in the said action against the defendant Tabor, over the said sum of £300, he the defendant would pay the same, and the taxed costs therein, if not paid by the defendant Tabor.

It appeared by the affidavits, that this action had been brought by the plaintiffs, who were engineers, against the defendant, as a director of the Armagh, Coleraine, and Portrush Railway Company, to recover the sum of £1020, for journeys, surveys, and superintendence of the said railway. A similar action for the same amount had been brought by the plaintiffs against Tabor, another director of the same company, and Tabor had paid £300 into court, and pleaded payment accordingly, together with other pleas. The plaintiffs did not reply to the pleas in the action against Tabor, but had given notice of trial in the present action.

Sir *F. Thesiger* shewed cause, and argued that the defendant might have pleaded that he was only liable as a joint contractor with Tabor, and that £300 had been paid into court by the latter in the action against him.

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ALDERSON, B.—On payment of costs, there will be a rule absolute for inserting on the record a plea of payment into court of £300, without actually paying in the same.

Bramwell, who appeared to support the rule, submitted that it should be without costs. He referred to *Carne* v. *Legh* (*a*), where, separate actions having been brought for the same debt against several persons who (if liable at all) were liable jointly, and the defendant in one action having paid the debt and costs in that action, the Court stayed proceedings in the others without costs.

ALDERSON, B.—The defendant is proposing to alter the record, and must pay the costs.

Rule accordingly.

(*a*) 6 B. & C. 124.

CROPTON and Others *v.* PICKERNELL and Another.

April 20.

Where a charterparty stipulates for seventy-five running days, and twenty days on demurrage, if the ship is detained for extra days, the remedy is not by an indebitatus count for demurrage, but by action on the charterparty itself.

DEBT for the use of a ship, whereof the plaintiffs were the owners, by the defendants before that time retained and kept on demurrage, with certain goods, merchandise, and chattels on board thereof, for a long time, and at the defendants' request. There was also a count on an account stated. Pleas, never indebted, and payment of money into court. The plaintiffs' demand was for thirty-two days' demurrage. At the trial, before *Pollock*, C. B., at the Middlesex sittings, it appeared that the plaintiffs were owners of the brig Tasso, which was chartered by the defendants at Swansea, in August, 1845, to take in a cargo of coals there, proceed to Glasgow, and there take in a cargo for Naples and Alexandria, and return from the latter place with a cargo to some port in the United Kingdom, at £1400 for the entire

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round out and home. Seventy-five running days were allowed for landing at Swansea and Glasgow, discharging at Naples, and reloading at the port of loading; the homeward cargo to be discharged according to the custom of the port of discharge, and twenty days on demurrage; and over and above the said lying days at £5 a day penalty for non-performance of the agreement. The action sought to recover £160, the amount of thirty-two days' demurrage. The sum paid into court exceeded twenty-four days, but did not amount to twenty-five days' demurrage. A subsequent agreement by the defendants to pay an extra £150 to the plaintiffs, for cutting the ship's beams for a particular object, was indorsed on the charterparty. The Chief Baron held that the charterparty could not be read for want of a stamp, and nonsuited the plaintiffs.

Sir *F. Thesiger* now moved to set aside the nonsuit, and for a new trial, on the ground that the charterparty was improperly rejected, no alteration having been made in it as to demurrage. Having obtained a rule to shew cause on this ground, he also mentioned that the defendants' counsel had objected at the trial that the action was incorrectly conceived, and should have been brought on the charterparty, citing *Horn* v. *Bensusan* (*a*). The nonsuit partly proceeded on this ground.

PARKE, B.—The defendants' argument would be, that on this declaration the plaintiffs could only go for the sum fixed to be paid for each day of demurrage, and not for days during which the ship was detained over and above the days of demurrage. Had she been detained for thirty-five days over the seventy-five running days, the plaintiffs could, on this

(*a*) 9 C. & P. 709. Common count for demurrage. There was no contract as to demurrage, but the ship-owner sought to recover for unreasonable detention of the ship, without a special count for not loading, &c. in a reasonable time, and *Parke*, B., directed a verdict for the defendant.

count, only recover for twenty days, though the defendants have paid into court for twenty-four days. Detaining the ship for extra days was a breach of contract, for which the action should have been brought on the charterparty.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

PER CURIAM:

Rule refused on the last ground.

GRABURN v. BROWN.

May 7.

In an action of debt on 2 & 3 Ed. 6, c. 13, s. 1, for treble value of tithes carried away before setting out the same, the defendant should not plead several pleas of nil debet by statute as to several parts of the lands on which the titheable matters were produced, but should plead one plea of nil debet by statute to the whole.

The defendant will be obliged to give a particular of all grounds of exemption, modus, &c., intended to be insisted on at the trial.

DEBT on 2 & 3 Edw. 6, c. 13, s. 1, for treble value of tithe of wheat, barley, oats, and hay, taken and carried away from the land where the same had been grown and cut down, and ought to have been tithed, the tenth part of the same respectively, or of any part thereof, not having been divided, separated, or set forth from the nine parts residue thereof, nor any composition or agreement made with the plaintiff for the tithe thereof, or any part thereof, contrary to the form of the statute in such case made and provided. Averment, that the tenth part of the corn, &c. taken away was worth £100. Breach, that actio accrevit for £300, as treble value, &c. Pleas, 1st, ("by statute," in margin), as to so much of the declaration as relates to 15 acres and 18 perches of land, parcel of the lands in the declaration mentioned, that the defendant does not owe the said sum of money in the declaration mentioned, or any part thereof, in respect of the said land, parcel &c., or any part thereof, in manner and form &c., concluding to the country. 2ndly, (also "by statute," in margin) a similar plea as to 18 acres, 1 rood, 10 perches, of the land, other parcel of the lands in the declaration mentioned. Eight other similar pleas to eight different quantities of lands, other parcels of the lands &c. The last (11th) plea (also "by statute," in margin) was a like plea

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as to so much of the declaration as related to the residue of the lands in the declaration mentioned. On 23rd February, 1847, two months' time to plead had been given to the defendant, who was to deliver, in a month, a particular of the lands which he admitted to be liable to tithes, and to have paid tithes; and further, to deliver on or before 15th May then next a statement, in writing, of the grounds of exemption from tithe on which he insisted, as to the residue of the lands occupied by him, stating whether modus or otherwise, with a description of such modus or moduses, or other exemption, as fully as would be required in an answer in a bill in Chancery filed for an account of all the tithes of the lands claimed by the defendant to be exempt; without prejudice to a bill in equity for a discovery on either side, or to establish a modus or moduses; the baron's order not to prevent the tithe commissioner from proceeding, if he thought fit. Further time to plead was given, on terms of pleading issuably.

Manisty had obtained a rule, calling upon the defendant to shew cause why the pleas should not be set aside.

Hugh Hill now shewed cause.—It will be contended that these pleas are not issuable (*a*). A question arose before a tithe commissioner as to the liability of particular farms to pay tithe in kind; and this action is brought with reference to 6 & 7 Will. 4, c. 71, s. 44, to try that liability in the first instance. There is no question but that some of the lands held by the defendant have always paid tithe, but a total exemption from tithe is insisted on in respect of other parts, and a farm modus as to the rest. The plea of nil debet is split accordingly. *Alderson*, B.—If that plea is distributable, it is very conve-

(*a*) As to this, see *Humphreys* v. *Williams*, 6 M. & W. 623; and per *Parke*, B., and *Alderson*, B., in *Mackey* v. *Wood*, 7 M. & W. 420.

nient to split it in the first instance.] The particular which the defendant is bound to deliver will ear-mark each set of lands on the record, so as to guide the tithe commissioner. [*Alderson*, B.—It is sought to plead the statutable plea of nil debet, by pleading it, not to the whole, but to parts, so as to apply each issue to particular land.]—The Court here called on

Manisty in support of the rule.—The grievance laid is, that the defendant owes money in respect of cutting the titheable produce of all the lands to which the pleas are pleaded, and carrying it away; not that he owes it in respect of occupation and enjoyment of the lands. [*Alderson*, B.—If that is true on the declaration, is it true on the declaration with the particular?] Each plea is not as to any sum, part of the sum demanded, but as to so much of the declaration as relates to a stated number of acres. [*Alderson*, B.—The defendant's difficulty is, that he can only identify the titheable proceeds by means of the lands on which they grew.] This is, in truth, a question of boundary between certain lands in respect of which tithes have and have not been paid in kind. The pleas will make difficulties on the record, which the order of the judge intended to avoid. [*Alderson*, B.—The particulars must be given according to that order before going to trial. Unless every plea is true, there will be no answer to the declaration.] These pleas, in substance, amount to but one plea to the whole lands, and would unnecessarily increase the costs.

The Court said they would consult the other judges.

Afterwards, the rule was made absolute; the defendant to plead de novo one plea of nil debet to the whole declaration, and to pay the costs of the application.

Rule absolute (*a*).

(*a*) See *Earl Spencer* v. *Swannell*, 3 M. & W. 154; *Prudhomme* v. *Fraser*, 2 Ad. & E. 645; Reg. Gen. Hil., 2 Will. 4, r. 2, 74.

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April 22.

CHARLES WILLIAMS *v.* CLARKE.

Assumpsit by Charles Williams, as indorsee of a bill, against the indorser. The declaration averred that *one* Charles Williams drew the bill on J. D., that the defendant indorsed it to the plaintiff, and that the drawee did not pay it when due. Plea, that the defendant had not due notice of the non-payment. The plaintiff was proved to be the drawer, and to have given notice of the dishonour to the defendant: — *Held*, that, on these pleadings, the defendant could not object that the plaintiff was not competent to give notice of dishonour, on the ground that the Charles Williams suing as indorsee and the Charles Williams stated in the declaration to be the drawer were the same person.

ASSUMPSIT on a bill of exchange. The plaintiff Charles Williams, in his declaration, stated that one Charles Williams, on 13th July, 1846, in parts beyond the seas, to wit, at Bruges, in the kingdom of Belgium, made his bill of exchange in writing, and directed the same to one J. Dickson, and thereby required the said J. Dickson to pay to the order of the defendant £200 sterling three months after the date thereof, which period had elapsed before the commencement of this suit. It then averred that the defendant indorsed the bill to the plaintiff, and that J. Dickson did not pay the bill. There were counts for money lent, interest, and on an account stated. Pleas: 1st, as to the first count, that defendant had not due notice of the non-payment of the said bill of exchange in that count mentioned, in manner and form, &c.; 2ndly, as to the residue of the declaration, non assumpsit. Issues thereon. At the trial, at the last London sittings, before *Pollock*, C. B., the following facts appeared:—The bill was produced, and the plaintiff's signature to it proved; he was shewn to be the drawer, and to have discounted it for Dickson, the drawee. The drawee and the defendant were both resident in London. The bill became due on the 13th October, 1846. The three days' grace elapsed on the 16th, and on that day payment of it was refused in London. On the 17th, it was protested and paid in London on behalf of the indorser's bankers at Ghent, and returned to them by post on that day. They immediately returned it to the plaintiff, who had indorsed it to them. Harley Williams, the plaintiff's son, proved that his father had drawn and discounted the bill, and that by his father's order he, on the 19th October, 1846, put a letter in the post at Bruges, directed to the defendant at a club in London, stating to him those facts respecting the bill, and informing him of

its dishonour. The defendant contended that this notice of dishonour, being given by the drawer after reindorsement to him, was not given by such a party to the bill as to be legal; and that, the bill being drawn in Belgium by a party domiciled there, the notice of dishonour was governed by the laws of England: *Rothschild* v. *Currie* (*a*). *Pollock*, C. B., overruled the objection, saying, that it had been decided that a first indorser, to whom a bill had been reindorsed by the first indorsee, was competent to give notice of dishonour (*b*). The plaintiff had a verdict for 203*l.* 16*s.* 2*d.*, the amount of the bill with notarial and protest charges, brokerage, postage, and commission.

Watson now moved for a new trial.—The action was by Charles Williams, as indorsee of a foreign bill drawn at Bruges by "one Charles Williams," and indorsed by the defendant to Charles Williams, the plaintiff. The plea was that the defendant had no notice of dishonour. The want of averment of protest was only open to special demurrer. The plaintiff proved that notice of dishonour was given in due time to the drawer; but the question was whether it was given to him by the proper person. The rest of the plaintiff's case was, that he, being drawer of the bill, was in possession of it, but he did not prove any agreement of the parties by which the bill, though drawn by the plaintiff, was to be reindorsed to him, so as to give him a primâ facie right to sue a prior indorser. [*Parke*, B.—That point, to be available to the defendant, should have been raised by plea (*c*), but is not. *Pollock*, C. B.—On these pleadings, you cannot say that Charles Williams the plaintiff, and "one Charles Williams" the drawer, are one and the same person.] The letter written by the plaintiff's son to the defendant states that his father, who is the plaintiff,

(*a*) 1 Q. B. 43.

(*b*) See *Bishop* v. *Hayward*, 4 T. R. 470; *Chapman* v. *Keane*, 3 Ad. & E. 193.

(*c*) See an instance, *Wilders* v. *Stevens*, 15 M. & W. 208.

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discounted the bill. [*Parke*, B.—*That* Charles Williams, being holder of the bill, gives you by his son notice of its dishonour; on the face of the declaration, *that* Charles Williams has an interest in the bill.] The defendant has only admitted a general indorsement. [*Pollock*, C. B.—No; the declaration states an indorsement by the defendant to *the plaintiff*, which is not denied by the plea.] Notice of dishonour can only be given by a person competent to give it, and the defendant is not estopped by these pleadings from relying on a defect in that particular. The defendant, the indorser, could not tell that C. Williams the drawer and C. Williams the plaintiff were one and the same person. The averment of the plaintiff in the declaration, that *one* Charles Williams drew the bill which the defendant indorsed to the plaintiff, imports that the drawer was some Charles Williams other and different from the plaintiff. In *Britten* v. *Webb* (*a*), the bill sued on was drawn by the plaintiffs upon one F. W., indorsed by the plaintiffs to defendant, and reindorsed by him to the plaintiffs. The declaration averred that, at the time of the drawing of the bill, and of its indorsement by the defendant to the plaintiffs, it had been agreed between them that the defendant's name should be indorsed on the bill as a security to the plaintiffs for the due payment of it by F. W., and that the bill was so indorsed by the defendant under such agreement, and for such purpose only, and that the plaintiffs took and received it in satisfaction of such debt of the said F. W., upon the faith that the defendant would indorse the same as such security, and that the indorsement by the plaintiffs was made without any consideration, and for the purpose only of procuring the defendant's indorsement, and making the bill negotiable. The declaration further averred, that the bill was presented to F. W., who refused to pay, and that notice of such refusal was given

(*a*) 2 B. & C. 483.

to the defendant, and he thereby became liable to pay, and being liable promised to do so. This declaration was held bad; for if the action was founded on the bill, the plaintiffs could only recover according to the custom of merchants, by which custom the plaintiffs, as indorsers and drawers, would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded on the special contract, it could not be maintained, for want of consideration for the defendant's indorsement. That decision was not referred to in *Wilders* v. *Stevens* (*a*). If, as is sworn, the drawer C. Williams discounted the bill, then he will not be entitled to sue this defendant, a subsequent indorser. The test of these cases is, whether the defendant, who is sued as indorser, has any remedy over against the drawer; here he has none against C. Williams. At all events, *Bishop* v. *Hayward* (*b*) is in the defendant's favour in arrest of judgment. Nothing in the declaration shews that the notice of dishonour was given by a person different from Charles Williams the drawer.

POLLOCK, C. B.—Whether Charles Williams the drawer and Charles Williams the plaintiff are the same or different persons is not put in issue by the defendant on this record.

PARKE, B.—On this declaration the issue is proved. By the custom of merchants, no action lies on a bill unless the drawer and the holder are different persons. It is plain that we must presume Charles Williams the drawer to be a different person from Charles Williams the plaintiff. Any defence resting on the fact that they were not different persons, but that the same person was drawer, indorser, and holder as reindorsee, should have been pleaded (*c*). There

(*a*) 15 M. & W. 208.
(*b*) 4 T. R. 470.
(*c*) See *Wilders* v. *Stevens*, 15 M. & W. 208; *Boulcott* v. *Woolcott*, ante, 584.

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is no affidavit that the defendant was surprised on this subject, or that from the beginning he did not know them to be the same person.

The other Barons concurring,

Rule refused.

April 20.

SIMMONS and Another *v.* EDWARDS and Another, Assignees of W. G. BARLEY, a Bankrupt.

Household furniture, linen, and plate belonging to B. were assigned by him, by deed, in contemplation of his marriage, to plaintiffs, in trust, after the marriage, to stand possessed thereof during the joint lives of B., the settlor, and his intended wife, for her sole and separate use, independently of A. The marriage took place, and B. afterwards became bankrupt. The settled furniture, &c. was then in the house in which he resided with his wife:— *Held*, that it was not, at the time of his bankruptcy, "in his order and disposition, with consent of the true owners," so as to pass the property in it, under 6 Geo. 4, c. 16, s. 72, to the defendants, his assignees; and the fact of the furniture, &c. not having been the wife's before the marriage was immaterial.

FEIGNED issue, directed under the Interpleader Act. The declaration stated, that whereas, heretofore and before the making of the promise by the defendants &c., the goods and chattels thereinafter mentioned (specifying them) had been seized and taken in execution by the sheriff of Northamptonshire, under and by virtue of a certain writ of execution against the goods and chattels of W. G. Barley; and that a certain fiat in bankruptcy had been and was issued against the said W. G. B., bearing date 7th September, 1846, under which fiat the defendants were appointed assignees of the estate and effects of the said W. G. B. That afterwards, to wit, on &c., a certain discourse was had and moved by and between the plaintiffs and the defendants of and concerning the said goods &c., wherein a certain question then arose, that is to say, whether, at the date and issuing of the said fiat against the said W. G. B., the said goods so seized and taken in execution were the property of the plaintiffs; and in that discourse the plaintiffs affirmed that the said goods were the property of the plaintiffs, which affirmation the defendants denied. The declaration concluded in the usual form.

Plea, that the said goods were not, nor were any or either of them, the property of the plaintiffs, in manner and form &c. Issue thereon.

At the trial before *Pollock*, C. B., at the Middlesex sittings after Hilary Term last, the facts appeared to be as follows:—On 25th August, 1846, the sheriff of Northamptonshire seized the drapery stock in trade, and also the household furniture, linen, and plate, the subject of this action, under a fieri facias against W. G. Barley, afterwards the bankrupt, in an action by one of the trustees of his marriage-settlement, hereafter set out. On 31st August, 1846, Barley executed an assignment of all his property, estate, and effects, including his household furniture, to trustees for the benefit of all his creditors. On the 7th September, a fiat issued against him, the act of bankruptcy relied on being the above assignment, and the messenger took possession of the stock in trade, and also of the furniture, &c. above-mentioned, under the warrant in bankruptcy. He found the sheriff's officer in possession under the above execution, and the defendant's wife claimed the furniture, &c. as being hers under the marriage settlement. On the 25th September assignees were appointed, and sold, under a judge's order, not only the stock in trade but the furniture, &c. then being in the house in which the bankrupt, his wife and family, had up to that time resided. The proceeds of the furniture, &c. were paid into court, to abide the event of an issue directed by the same order under the Interpleader Act, to try the validity of the execution under which they had been taken, the trustees under the bankrupt's marriage-settlement being the plaintiffs, and his assignees the defendants. Shortly before the bankrupt's marriage, in 1841, and before he became a trader, he, by deed executed in contemplation of marriage, assigned to the plaintiffs, on the trusts therein set forth, the household furniture, linen, and plate comprised in the first schedule or inventory annexed to the deed, to hold

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the same to the plaintiffs, in trust that they, after the solemnization of the marriage, should stand possessed of and interested therein during the joint lives of the settlor and his then intended wife, for the sole and separate use of the latter, independently and exclusively of her then intended husband. The furniture, &c., was the property of the husband before his marriage. Evidence was offered to prove these articles to be the same that were taken in execution and afterwards sold under the judge's order, as before stated; but the learned Chief Baron held such proof unnecessary, unless the identity was controverted (*a*). It was not shewn that, at the date of the assignment for the benefit of the creditors, the plaintiff in the execution, or any other trustee of the settlement, had taken or asserted a right to the possession of the furniture, &c. under the deed, so as to make the subsequent possession by the defendant or his wife, up to the time of the bankruptcy, inconsistent with the trusts of the deed, and a possession with consent of the true owners, under 6 Geo. 4, c. 16, s. 72 (*b*). By consent, certain carpets in process of fitting to the rooms at the time of the marriage, but not then delivered, were taken as if included in the schedule annexed to the deed of settlement. The plaintiffs had a verdict for the value of the goods claimed, leave being given to the defendants to move to enter a verdict for them, on the ground that the furniture and other articles comprised in the marriage-settlement were in the order and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owners thereof, and passed to the defendants, as his assignees, under 6 Geo. 4, c. 16, s. 72.

(*a*) In *James* v. *Woolston*, 3 T. R. 616, the goods were identified at the trial, but had not been, as in this case, scheduled in the deed of assignment.

(*b*) See *Pariente* v. *Pennell*, 2 M. & Rob. 517; *Ex parte Styan*, 2 Mont. Deac. & De Gex, 213; *Smith* v. *Smith*, 2 C. & M. 233. As to the wife's possession, see per *Buller*, J., in 3 T. R. 610; and *Ex parte Martin*, 2 Rose's Bankruptcy Cases, 331.

Knowles now moved pursuant to the leave reserved.—*Jarman* v. *Woolloton* (*a*) and *Haselinton* v. *Gill* (*b*), are the leading authorities on this subject. In *Jarman* v. *Woolloton* it was held that a woman might, before marriage, convey her stock in trade and furniture to trustees, to enable her to carry on her business in London separately from her husband; and that, even if the jury should think that after the marriage the business was carried onby the husband as well as the wife, the furniture, though removed to the husband's house, would not be liable to his debts. That case is quite distinguishable; for the wife was the meritorious owner of the furniture in that case, which afforded a good reason for its not passing to the husband's assignee. In the other cases where goods settled before marriage have been held not to pass to the husband's assignees, they have been originally the wife's property: *Darby* v. *Smith* (*c*), *Lingham* v. *Biggs* (*d*), *Quick* v. *Staines* (*e*). In *Ex parte Castle* (*f*), D. Acraman, being owner of certain goods, gave them to his son by deed, dated 17th October, 1839, in consideration of natural love and affection, on trust to permit D. Acraman to have the use and enjoyment of them for life, and after his decease to and for the benefit of the son, his executors, &c. This deed and transfer of property was not made public or notorious, and D. Acraman continued in visible possession of the goods till his bankruptcy. *Knight Bruce*, V. C., held that the goods were in his order and disposition with the consent of the true owner, under 6 Geo. 4, c. 16, s. 72; being of opinion that, inasmuch as the possession of D. Acraman was, in the eye of the world, referable to his own original title, the son, who was able and concerned to give notice of the charge, by omitting to do so, permitted a mistaken view of the matter to be entertained, so

(*a*) 3 T. R. 618.
(*b*) Id. 620, n.
(*c*) 8 T. R. 82.
(*d*) 1 Bos. & P. 88.
(*e*) 1 B. & P. 293.
(*f*) 3 Deacon & De Gex's Bankruptcy Cases, 117. See *Armstrong* v. *Baldock*, Gow, 33.

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as to cause the reputation of absolute ownership by D. Acraman to continue, and thus gave consent not merely that his father should have a life interest in them, but that he should possess them absolutely (*a*). In *Haselinton* v. *Gill* (*b*), cows, the property of the wife, were assigned by her, before marriage, to trustees on trust to permit her to dispose of them and their increase for her and their own proper use. The husband covenanted to permit the wife to carry on the trade of a cowkeeper for her sole use and benefit. This settlement was upheld against the debts of the husband; Lord *Mansfield* saying its consideration was valuable, because it was made before marriage, and the more so because it was a settlement of the wife's own property before marriage; but that, if the husband had carried on the trade in his own name, and contracted debts in it, that would have varied the case. [*Parke*, B.—In the case put by Lord *Mansfield*, the husband would have been using the cows in a manner inconsistent with the trusts of the deed. Here all that has been done is according to the trust of the deed and consistent with it (*c*), viz., permitting the wife to enjoy the furniture and other articles.] Where the settled chattels have always been the property of the husband, his possession, particularly after he became a trader, would be referred to that property. [*Parke*, B.—The best exposition of the law on this subject is that which is given by Lord *Redesdale*, in *Joy* v. *Campbell* (*d*). Here, as in that case, the trustees were to permit the wife to enjoy.]

POLLOCK, C. B.—The furniture and other articles passed by the deed to the trustees, just as if they had been the property of the wife herself before the marriage.

(*a*) See *Ex parte Horwood*, 1 Mont. & Macarthur, 169; *Whitfield* v. *Brand*, ante, p. 282.

(*b*) 3 T. R. 620, n.

(*c*) *Martindale* v. *Booth*, 3 B. & Adol. 498; *Carr* v. *Burdiss*, 5 Tyrw. 316.

(*d*) 1 Sch. & Lef. 366. See it stated ante, p. 286.

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PARKE, B.—The possession which has followed the deed has been right, and consistent with its terms.

ROLFE, B., and PLATT, B., concurred.

PER CURIAM, Rule refused (*a*).

(*a*) See *Ex parte Massey*, 2 Mont. & Ayr. 173; *Ex parte Elliston*, Id. 365.

IVIMEY *v.* MARKS.

May 1.

An attorney is bound to specify in his bill as well every court, as the name of every suit, in which the business charged for was done. Such bill is an entire thing, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation; and the charges in the same bill for equity business, though correctly stated, cannot be recovered.

DEBT for work done and materials found by the plaintiff as an attorney, with counts for money paid and on an account stated. Pleas: 1st, never indebted; 2nd, as to the first and second counts, that the plaintiff, before and at the time of the doing of the said work and providing of the said materials, and of the paying the money, as in those counts mentioned, was an attorney of her Majesty's Court of Exchequer at Westminster and a solicitor of her Majesty's High Court of Chancery, and the said work, and every part thereof, was business done by him as an attorney and solicitor; and the said materials were provided by the plaintiff as aforesaid, as an attorney and solicitor, in and about the said work and business, and not otherwise; and the said money in the first count mentioned was and is, and consisted and consists of fees and charges for the said business so done and the said materials so provided, and of no other money whatever; and the said money in the second count mentioned to have been paid was, and every part thereof was, so paid by the plaintiff as an attorney and solicitor, in disbursements for and in and about the said work and business, and not otherwise. And the

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defendant further says, that this action was commenced on the 20th July, 1846, and that no bill of the said fees, charges, and disbursements, or of any or either of them, or of any part thereof, subscribed with the proper hand of the plaintiff, was, one calendar month or at any time before the commencement of this suit, delivered unto the defendant, or sent by the post to or left for the defendant at his counting-house, office of business, dwelling-house, or last known place of abode; nor was any bill of the said fees and disbursements, or of any, &c., one calendar month or at any time before the commencement of this suit, delivered unto the defendant (*a*), or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last place of abode, inclosed in or accompanied by a letter subscribed with the proper hand of the plaintiff, referring to such bill, as was and is required by the statute in such case made and provided (*b*). And the defendant further says, that the plaintiff was not authorised to commence this action by any judge whatsoever (*c*); and that the defendant, at the time of the commencement of the suit, was not, nor ever was, an attorney of any court whatsoever.—Verification.

Replication to last plea, that a bill of the said fees, charges, and disbursements was, one calendar month before the commencement of this suit, to wit, on 17th June, 1846, duly left for the defendant, to wit, by the plaintiff, at his the said defendant's office of business, inclosed in a letter subscribed with the proper hand of the plaintiff, to wit, with his the plaintiff's own name, referring to such bill, in manner and form as required by the statute in such case made &c. Issue thereon.

The particulars of demand were for 88*l.* 15*s.* 8*d.* for work done by the plaintiff, as an attorney and solicitor, for

(*a*) *Painter* v. *Linsell*, 8 Dowl. P. C. 250.

(*b*) 6 & 7 Vict. c. 73, s. 37.

(*c*) Ibid., and s. 43.

the defendant at his request, and for money paid and fees due in respect thereof, from September, 1843, to the month of May, 1846. At the trial, before *Platt*, B., at the Middlesex Sittings in Michaelmas Term, 1846, the delivery of the bill at the defendant's shop in Oxford-street was proved. The bill was for conveyancing (*a*) and for business done in the Court of Chancery and in Bankruptcy, and in an action thus described—"Yourself ats. Erskine," subjoining items, "time to plead," "attending judge's clerk," &c., shewing the cause to have been apparently in a court of common law, but not stating, according to 6 & 7 Vict. c. 73, s. 37, in what court the action was (*b*), viz. whether in a superior court at Westminster or in a local court only.

The business charged for was proved to have been done; but it was insisted for the defendant, that the plaintiff should be nonsuited, as the bill did not describe the business, or the court in which it was done. *Martindale* v. *Falkner* (*c*) was relied on. The plaintiff obtained a verdict for the amount of the bill, with leave to the defendant to move to enter a nonsuit, or to reduce the damages to the amount of work done in chancery, bankruptcy, or conveyancing.

Peacock having obtained a rule according to the leave reserved,

Farrar shewed cause.—[*Parke*, B.—The whole question turns on the bill. Must not it state the court in which the business was done?] The bill delivered does, as to £20, comply with the 6 & 7 Vict. c. 73, s. 37 (*d*).

(*a*) *Brooks* v. *Baskett*, 16 Law J., Q. B., 178.

(*b*) See 15 M. & W. 548; *Lane* v. *Glenny*, 7 Ad. & E. 83.

(*c*) 2 C. B. 706; 15 Law J., C. P., 91.

(*d*) Enacting that, on application of the party chargeable by an attorney or solicitor's bill within the month after delivery

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Engleheart v. *Moore* (*a*) shews that an attorney's bill for common-law business must shew in what court the business was done. *Alderson*, B., there assigns as a reason, that it is very material that the bill should shew in what court the business was done, because the fees are different in different courts, and an attorney cannot advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid; for, without such information, he could not know whether, on taxation, one-sixth of the bill would be struck off or not (*b*). Now substantial information has here been given; for, looking at the whole bill, an attorney would be satisfied from the items, "summons for time to plead, attending judge's clerk," &c., that the work was done in one of the superior courts, and the charges would be similar in either of them. Is an attorney still obliged to go for taxation to the court where the greatest part of the business in amount of the value was transacted (*c*)? [*Parke*, B.—He is at liberty, but not bound to do so. Had the taxation begun in the Court of Chancery, the taxing officer there would have sent the bill to that court

of a signed bill, "it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or Master of the Rolls, and in case *any part of such business shall have been transacted in any other court*, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee thereupon, *to be taxed and settled by the proper officer of the court in which such reference shall be made*, without any money being brought into court.

(*a*) 15 M. & W. 548.

(*b*) S. P., per Lord *Denman*, 6 Q. B. 268,—viz. so as to make the attorney pay the costs of taxation under sect. 37.

(*c*) This was so enacted by 2 Geo. 2, c. 23.

of common law where most of the common-law business was done, to tax that part of the bill. In *Lewis* v. *Primrose* (*a*) the Court of Queen's Bench held, that, by the old act, 2 Geo. 2, c. 23, s. 23, the client was entitled to know to what court he is to apply for taxation of the bill, as well as in what cause. The like reasons were given as were afterwards adopted by this Court in *Engleheart* v. *Moore*.] The taxation in the common law courts is equal. Why should the client go first to the Court of Chancery, in order to be sent elsewhere for taxation of part of his bill? *Martindale* v. *Falkner* (*b*), following *Lewis* v. *Primrose*, decides that, by the old act, 2 Geo. 2, c. 23, the attorney's bill should so far disclose the title of the suit or proceeding, with the name of the court in which the greatest part of the business was done, as to enable a person of ordinary understanding to collect the name of the suit and the court in which the matters charged for took place. [*Parke*, B.—In point of practice, a bill is always referred for taxation to the court in which the greater part of the business was done. In *Lewis* v. *Primrose*, Lord *Denman* says—"The only object of the enactment (*c*) is, that the client, if he likes, may take the bill to another attorney for his advice on it. Why is the client to be forced to ask questions? and how can we say that he is told in respect of what business the charge is made, when he is not told where the business was done?" He then adds, that, in such a case as in that of a notice of action against a magistrate, the facts which are spoken of must be fully brought to the knowledge of the party receiving the notice. Then *Patteson*, J., says, "The argument drawn from the power the Court has to order taxation appears to me very strong. For how inconvenient it would be, if a judge, in order to

(*a*) 6 Q. B. 265.
(*b*) 2 C. B. 706.
(*c*) Viz. 2 Geo. 2, c. 23, s. 23, parallel to 6 & 7 Vict. c. 73, s. 37, the existing provision.

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ascertain whether he has jurisdiction, had to receive evidence shewing where the business had been done. The rule imposes no hardship on the plaintiff; and I think it much best to hold that a bill, to be correct, must specify the court and the cause." Why should not these reasons still prevail? By the new act, 6 & 7 Vict. c. 73, s. 37, the client is referred to the court where some part of the business was done. If that be a court of equity, it refers the common-law part to a taxing-officer of that common-law court where it arose. In *Martindale* v. *Falkner* (*a*), *Maule*, J., differed from the other judges, who thought that the court and cause might be sufficiently collected from the bill, and, after entertaining a different opinion at Nisi Prius, gave an elaborate judgment to shew that the client ought not to be taken to know what is familiar to practitioners. In this case, no person, be he ignorant or skilful, can tell in what court of common law this business was done.] The chancery, bankruptcy, and conveyancing items are not disputed. Then, can the plaintiff recover for the residue? [*Rolfe*, B.—The bill is sufficient as to them; and leave was given to reduce the verdict, by taking off the common-law items.] *Drew* v. *Clifford* (*b*) shews that, though one set of charges in an attorney's bill is not properly detailed, the residue, which is, may be recovered. Here the items in Chancery, &c. are not disputed. [*Pollock*, C. B.—In that case it was never objected that the bill could not be split, only that, as to a particular item, no such bill had been delivered as was required by the 2 Geo. 2. Lord *Tenterden* directed a verdict for the residue, giving leave to move to correct his judgment. No application, however, was made.]

Pocock, in support of the rule.—The judgment of *Maule*, J., in *Martindale* v. *Falkner* is strong as to the principle which

(*a*) 2 C. B. 706. (*b*) Ry. & M. 280.

should rule this case. [*Pollock*, C. B.—The only question now is, whether the plaintiff is entitled to recover the costs incurred in Chancery, &c.] The client is put in a different position where the bill delivered is as well for common-law as equity business. If a bill is delivered for one sort of business only, the defendant might get the costs of taxation, for one-sixth might be taken off; whereas, if both sorts of business are blended, he might, in a like event of the taxation, be obliged to pay those costs. Again, an attorney, if consulted, might be unable to tell who would have to pay them, till he knew to what court the bill would be referred. Before the new act, 6 & 7 Vict., expressly made charges for conveyancing taxable, if they occurred in a taxable bill, the whole became taxable, and the bill must have been delivered a calendar month before the action. The plaintiff might have had two bills, one for the equity, and the other for the common-law business; but as he has chosen to blend them, his bill is an entire thing; and the rule must be laid down generally, without entering into the amount of business done in either class of courts. For, as the one-sixth, if taken off, must be taken off the whole bill, the client cannot be advised to risk losing the costs of taxation, without knowing distinctly from the bill to what court of common law it would be referred by the Master in Chancery in the usual course. If the plaintiff has so specified his chancery charges in his bill as to give the defendant proper information of them, he would either recover these without the opportunity of taxation, or the bill would be taxed at the risk of the client's paying the whole costs of taxation. Therefore the rule should be absolute for a nonsuit, and not merely to reduce the damages by striking off the common-law items.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute for entering a nonsuit. The question, whether

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an attorney is entitled to recover such part of his bill as is sufficiently stated, is suggested by Lord *Tenterden* at Nisi Prius, in *Drew* v. *Clifford* (*a*), but was not moved in banc afterwards, so that we do not consider the decision binding on us. In *Waller* v. *Lacy* (*b*), the Court of Common Pleas seemed to be of opinion that an attorney may recover a class of items properly stated in his bill, though another class of items is ill stated there; but that case was decided on the old act of 2 Geo. 2, before the modern and important change in the law by which every part of an attorney's bill is taxable. And in *Hill* v. *Humphreys* (*c*), decided in the Court of Common Pleas very long before that enactment (*d*), Lord *Eldon*, C. J., held that if an item for conveyancing, which, standing alone, was not taxable at that time, occurred in a bill otherwise taxable, it could not be recovered without proof of a delivery of such bill a month before action brought, "and," he says, "on these principles, namely, that what is paid for conveyancing is paid in the character and in the exercise of the duties of an attorney; that a person shall not split the demand which he has in the character of an attorney; and that the statute attaches on the whole demand which he has in that character." That appears to me well decided, and on good reasons. Then, as the client is entitled to have his whole bill taxed, if the attorney does not deliver a sufficient bill as to the whole, it is the same case as if he had delivered no bill at all. I adopt Mr. *Peacock's* argument—that, when a bill is delivered blending items of business done in the courts of law and equity, the client is entitled to have the whole bill taxed; and if no court of common law in which the business was done is mentioned in that bill, the result is the same as if no bill at all had been delivered. Here there clearly

(*a*) Ry. & M. 280.
(*b*) 1 M. & Gr. 54.
(*c*) 2 Bos. & P. 343.
(*d*) 6 & 7 Vict. c. 73, s. 37.

were other items for business done in Chancery; yet no such bill was delivered as to get the other class of items taxed. The plaintiff has not delivered such a bill as he could be fairly advised to get taxed, except at a risk of taxation in both courts, incurring the costs of the whole.

The other Barons concurred.

Rule absolute for a nonsuit.

ASPREY v. LEVY. *May* 4.

The plaintiff accepted a bill for £25 for the accommodation of F., who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession-money. F. was to get the bill discounted by the defendant or elsewhere, and to give the plaintiff the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that the plaintiff had had no value for his acceptance. The defendant indorsed it over, and kept the proceeds. The holder sued the plaintiff, who thereupon paid him the whole amount of the bill:—*Held*, that the plaintiff had no right of action against the defendant as for money paid to his use on a request implied by law; but that his remedy was against F., on an implied contract to indemnify the plaintiff for lending him his, the plaintiff's acceptance.

ASSUMPSIT for money paid, and on an account stated. Plea, non assumpsit. The particular of the plaintiff's demand claimed £25 for money paid by the plaintiff for the use of the defendant, and at his request, to one John Williams, in respect of a certain bill of exchange, dated 28th January, 1846. At the trial, at the Middlesex Sittings after last Michaelmas Term, before the Lord Chief Baron, the following appeared to be the facts. The defendant, a sheriff's officer, was in possession of the goods of one Faucher under a fi. fa. at the suit of Hart. A prior execution had issued by Goldshede against the same goods; but a subsequent distress for rent having exhausted them all, Goldshede withdrew from possession, without claiming possession-money. The attorney for Hart gave an unconditional order to the defendant to withdraw also, but the defendant refused, except on the terms of receiving £5 for possession-money from Faucher. Faucher told him he hoped the plaintiff would accept a bill for his accommodation. The defendant said, if

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Faucher could obtain the plaintiff's security for seven guineas, which he then demanded for possession-money, he, the defendant, would leave possession. The plaintiff afterwards, on Faucher's request, accepted the bill, dated 28th of January, 1846, drawn by Faucher, for £25, at two months' date, on the understanding that Faucher would get it discounted by the plaintiff, or elsewhere, and, after retaining the seven guineas, give the plaintiff the difference. Faucher handed this bill to the defendant as a security for the £5 possession-money as first demanded, and the defendant withdrew his man from possession, but would not discount or give up the bill till he received seven guineas. The bill was not discounted, but was indorsed by the defendant to Williams, and handed to Teague, the attorney to Williams. At its maturity, on the 31st of March, it was presented for payment by Teague on behalf of Williams, and was dishonoured. Williams then sued the present plaintiff on the bill, and declared on the 2nd of May. On the 7th of May, the defendant, through Teague, offered to pay £13 to the plaintiff's attorney, and to deliver up the bill to him on receiving £12 and interest. The plaintiff did not answer this, but on the 16th of May settled the action with Williams, by paying him £25, the amount of the bill, and 10*l.* 4*s.* costs. On that day the defendant was served with the following notices. The first was as follows:—

"To Mr. Lawrence Levy.

"I hereby give you notice, that the bill of exchange drawn by myself upon, and accepted by, Mr. Frederick Asprey (the plaintiff) for the sum of £25, dated the 28th day of January, 1846, payable two months after date, was accepted without any consideration, and was handed to me by the said F. Asprey for the purpose of being discounted, and for which purpose I indorsed and handed you the same. Now I hereby desire and authorise you

to deliver the said bill to Mr. F. Asprey, as I have no claim on him in respect thereof. May 8th, 1846.

"Yours, &c.

"F. FAUCHER."

The second was of the same date, and in these terms:—

"I hereby give you notice, that I am sued by Mr. Williams for the amount of the bill of exchange for £25, drawn by Mr. Faucher on, and accepted by, myself, which bill is more particularly mentioned in the annexed notice; and Mr. Williams having given you notice for the same, which you have fraudulently retained, I hereby give you notice, that, if I am compelled to pay the amount of such bill and costs to Mr. Williams, I shall hold you responsible for the same. Yours, &c.

"To Mr. Lawrence Levy." "FREDERICK ASPREY.

The following letter was then sent by the defendant to Faucher, the drawer of the bill:—

"17, Norfolk-street, Strand. May 16th, 1846.

"Sir,—I have this day received your notice, dated 8th of May, relative to the bill for £25, accepted by Mr. Asprey; and I beg to inform you that I had paid it to Mr. Teague by a cheque on the London and Westminster Bank for the sum of £13, being the balance of the bill for £25, after deducting £12, the amount payable by you to myself, and which cheque has been this day returned to me by Mr. Teague; and I, therefore, hold the same on your account, and am ready to deliver you the £13 at any time on request.

(Signed) "L. LEVY."

This letter was directed to Mr. F. Faucher, at Mr. Asprey's, 6, Furnival's-inn, Holborn, and was left about 7 o'clock at Mr. Asprey's on the evening of the 16th of

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May, 1846, though the messenger was informed that no papers were received there for Faucher. Faucher never received it, and no notice was taken of it.

On the same 16th of May, a letter was written by the plaintiff's attorney to the defendant, applying to him for payment of the amount of a bill for £25 and expenses, which he had been compelled to pay to Mr. Williams in consequence of the defendant's having improperly negotiated the same, and retained the proceeds to his own use, and threatening proceedings if such payment was not made.

Faucher proved that he had received no value for the bill, and that there was no other consideration for his parting with it to the defendant but the £5 between him and defendant.

For the defendant, it was submitted that the action would not lie, because the plaintiff had paid the amount of the bill without compulsion, and the defendant had a right to retain it as against Faucher for 7*l.* 7*s.*, or at least for £5. The defendant had indorsed it to Williams, who sued on it before any notice had been given by the plaintiff respecting the bill. The Lord Chief Baron observed, that there was no dispute as to £5. A verdict was found for the plaintiff for £20, with leave to the defendant to move to enter a nonsuit, the Court to be at liberty, on disposing of that motion, to enter a verdict for £25, if they should think fit. A rule having been obtained according to the leave reserved,

Watson and *Taprell* shewed cause.—This action is sustainable for £25, as money paid to the use of the defendant. First, as there were no goods of Faucher on which to levy the execution, the defendant could not claim possession-money from Faucher (*a*). Next, as to the acceptance obtained from the plaintiff by Faucher, and deposited by him

(*a*) *Buckle* v. *Bewes*, 3 B. & C. 688.

with the defendant, it was held by the latter either as a security for the £5 claimed for possession-money against Faucher, or without consideration as between them. At that moment, the plaintiff became a surety to the defendant for Faucher, so as to satisfy any requirement of privity between the plaintiff and the defendant. The defendant, having full notice that it was an accommodation bill, indorsed it to Williams, and got the amount. He, being the only person who paid anything on it, had a legal claim to enforce it against the acceptor. The plaintiff, being thus obliged to pay it to the holder, has paid money to the use, not of Faucher, but of the defendant, who, knowing the acceptance to have been given without value, for the accommodation of Faucher, and intended to be discounted for his benefit, indorsed the bill nevertheless for his own benefit, and got the amount; thus compelling the plaintiff, the accommodation acceptor, to pay it to the indorsee. In *Bleaden* v. *Charles* (*a*), Hay drew a bill on the plaintiff for 68*l.* 15*s.*, which he accepted and delivered to him to assist him on an emergency. It was afterwards delivered up to the plaintiff without being used; but Hay having afterwards bought £20 worth of goods from the defendant, obtained possession of them, by getting the bill again from the plaintiff, and leaving it with the defendant as security for the £20, telling him the circumstances respecting it. Hay afterwards paid the £20 by cheque, and demanded the bill; but being still indebted to the defendant, the defendant refused to deliver it up, and indorsed it for value to Henderson, who recovered on it against the plaintiff. The plaintiff having sued the defendant for money paid to his use, the Court held that the action would lie; *Tindal*, C. J., saying, the money had been paid in a way which had been serviceable to the defendant, and a privity had arisen between them out of the manner of depositing the bill as a security,

(*a*) 7 Bing. 246.

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the defendant being then apprised that nothing was due from the plaintiff to Hay on it. He adds, that "it is clear that, after Hay had paid the defendant for the goods, the indorsement of the bill by him was wrongful, and the payment by the plaintiff, on Henderson's suing him, compulsory. There has been, therefore, a compulsory payment by the plaintiff, induced by an act of the defendant, an act of which he has had the full benefit. That is money paid to the defendant's use." [*Parke*, B.—Here the liability on the bill is transferred, but it is difficult to see how the privity is.] It is no longer necessary to make out privity of contract between the parties, in the action for money paid; *Pownal* v. *Ferrand* (*a*). Lord *Tenterden* there affirms the general principle, that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter, who may sue him as for money paid to his use; and *Holroyd* and *Littledale*, Js., assert the same law, as governing payments of the debt of another by compulsion of legal process. The latter cites *Exall* v. *Partridge* (*b*) as similar in principle; and adds, "There the lessees were liable by law to pay the rent. Here the acceptor was by law liable to pay the amount specified in the bill; and the indorser was liable only in default of payment by the acceptor. So, in *Exall* v. *Partridge*, the stranger, having his goods on the premises in respect of which the rent was due, became, by reason of the lessee's default, liable to satisfy the rent out of his goods. It was held, in that case, that the law would imply a promise on the part of the lessees to repay the stranger the rent which he has been compelled to pay." [*Parke*, B.—Here is a contract between the plaintiff and Faucher, that, if the defendant will lend him his acceptance, Faucher will indemnify him for any use he, Faucher, may make of that bill. In *Bleaden* v. *Charles*, *Gaselee*, J.,

(*a*) 6 B. & C. 439.
(*b*) 8 T. R. 308. See *Spencer* v. *Parry*, 3 Ad. & Ell. 332.

puts that case on the ground that, where the price of the goods for which the bill was deposited as a security was tendered or paid, the defendant had no longer any right to the bill, but was in the condition of a person who had simply found it. The plaintiff, therefore, was compelled to pay by the wrongful act of the defendant; and, as the defendant had the benefit of the payment, the money must be considered as paid to his use. Here the bill was parted with by Faucher, not for money, but to secure a debt, which he had no right to do; and in the result, a third person, Williams, having got it, became the holder, and recovered on it against the plaintiff. The case much resembles *Bleaden* v. *Charles;* but the plaintiff's difficulty in this case is, that all that was done by him was done on a contract with Faucher.] The sum of the plaintiff's case is, that his bill, having got into defendant's hands, with notice that no value had been given for it, the defendant takes a step by indorsing it, which compels the plaintiff to pay it. Then he is liable to the plaintiff as for money paid to his use, not in respect of any priority on the bill, but on his request, as implied by the law, to pay it; the compulsion of process being the evidence of a previous request on the maxim, "Omnis ratihabitio retrotrahitur et mandato æquiparatur" (*a*). *Jones* v. *Hibbert* (*b*) was also cited.

Humfrey and *Archbold,* in support of the rule.—The defendant, being a sheriff's officer in possession, claimed seven guineas possession-money from Faucher, the defendant in the execution, and took from him the plaintiff's bill for £25, not to stand as his security for the seven guineas charged to Faucher, but in order to be discounted. He indorsed the bill to Williams, who held it when it became due. [*Pollock,* C. B.—There was no exchange of acceptances. Faucher said to the plaintiff, perhaps the defend-

(*a*) 1 Wms. Saund. 264 *a*, notes. (*b*) 2 Stark. N. P. C. 304.

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ant will discount the bill, and give us the difference. *Parke*, B.—The difference was to be given to Faucher, after deducting either seven guineas or £5 from the amount of the bill. *Platt*, B.—The plaintiff might recover against Faucher for money had and received.] If the defendant had not discounted the bill, how could he have offered to pay Faucher the difference, viz. £13? [*Parke*, B.—According to your argument, nothing has been done with the bill but what the plaintiff meant should be done with it: so that the plaintiff's remedy must remain on the old liability of Faucher.] If priority of contract were not a necessary ingredient in these cases, a man might be made debtor to another against his will. [*Pollock*, C. B.—The situation of the parties never changed till after the maturity of the bill, and after an action had been brought on it by Williams against the plaintiff. *Parke*, B.—The indorser is security for payment by the acceptor; and if he pays, he pays on account of the acceptor. *Platt*, B.—In *Pownal* v. *Ferrand* (*a*) the £40 was paid in relief of the defendant. That is not the case here.]

POLLOCK, C. B.—This rule must be absolute. I should be glad to have been able to have sustained the verdict in a case where the defendant, having obtained the security of the plaintiff's bill for £25 for a claim against a third person of, at utmost, seven guineas, indorsed it over, and kept the whole proceeds. *Bleaden* v. *Charles* (*b*) was cited in support of the plaintiff's claim, and, in one aspect, bears much on it. Indeed, till the original circumstances of this case are carefully considered, it seems exactly in point. But Mr. *Humfrey* has ably pointed out the material difference in point of fact between the two cases. Here it was intended by the plaintiff, that the defendant should have the bill, and discount it. He had it, and either discounted or paid it away. To

(*a*) 6 B. & C. 439. (*b*) 7 Bing. 246.

whom is he liable for the proceeds? The bill did not become due till the 31st of March. The writ was not in evidence, but the declaration was of the 2nd of May. No claim of the bill was made by the plaintiff till after it was paid away by the defendant, and an action had been brought against him upon it by the holder, Williams. Then the plaintiff's present remedy is not against this defendant, but Faucher. It is unnecessary to consider what might have been the result had the plaintiff followed the bill while in the defendant's hands, before it was negotiated.

PARKE, B.—I am of the same opinion. If a man gives his acceptance to another for the accommodation of that other, and the bill is disposed of according to the original intention of the parties, and the acceptor afterwards pays it accordingly, he cannot call on the indorsers, but his remedy is on the original contract against the drawer. Here the plaintiff's remedy is against Faucher, for the breach of his contract to indemnify the plaintiff against the consequences of accepting the bill for his accommodation. My only doubt arises on *Bleaden* v. *Charles;* but that case is distinguishable on the ground there put by *Gaselee*, J., and *Bosanquet*, J., and now by the Lord Chief Baron, which shews that the money has been paid by the plaintiff to the use of Faucher, and not to that of the defendant. An answer has been given by my Brother *Platt* to the observation raised on *Pownal* v. *Ferrand.* As to *Exall* v. *Partridge*, the stranger's goods, when put by him on the land, became security to the landlord for the original tenant, who ought to have paid the rent. The plaintiff's remedy is against Faucher, to whom he lent his acceptance on his implied contract of indemnity.

ROLFE, B., concurred.

PLATT, B.—According to the argument for the plaintiff,

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it might be said that, had the bill been indorsed by Williams, and paid by him, he might have also alleged that he had paid it to the use of the defendant.

Rule absolute.

April 27.

ORMEROD and Others *v.* THOMPSON and Others.

The expenses of surveying and taking levels in order to ascertain whether a weir had been improperly raised, to the prejudice of plaintiff's water-mill, will not be allowed him on taxation.

THIS was an action for obstructing the flow of water through certain goits to the plaintiff's mill by raising a certain weir. Verdict for plaintiff. The Master had disallowed £43, claimed by the plaintiff as paid by him to three surveyors, for taking three sets of levels after action brought, in order to shew the wrongful act of the defendants. The Master disallowed the items on the ground that the levels should have been taken and the result arrived at before the action was brought, so that the costs of taking them were not properly costs in the cause.

Atherton now moved for a rule nisi to review the taxation.—The question of fact between the parties being, whether the weir had been improperly raised, could not be ascertained by casual observation, or without experiment. [*Pollock*, C. B.—You should say that it was essential to the plaintiff's case to take observations of a more skilled and accurate nature than common persons would make; for *Severn* v. *Olive* (*a*) shews that, though experiments of scientific men may have been necessarily made in order to afford evidence on a point in dispute new to them, the expenses of so doing and of their loss of time cannot be allowed.] The expense of plans made for information of the Court, has

(*a*) 3 Brod. & B. 72. See Id. 293; 5 M. & S. 156, S. P.

been allowed: *Holmes* v. *Holmes* (*a*). In *May* v. *Selby* (*b*) the action was against a surveyor for improperly rating goods at an excessive price, and the plaintiff's costs of thirteen witnesses, employed by him to survey the goods, in order to enable them to give evidence at the trial, were disallowed. There the number of surveyors was unreasonable.

POLLOCK, C. B.—We ought to be cautious not to extend the area of costs, by allowing expenses of this kind. Were we to relax as to them, it is difficult to say where they would end. The safe rule is, that the costs of all evidence which naturally exists as to any issue will be allowed, but that the expenses of artificial discovery by experiments, resorted to from the anxiety of parties to throw extra light upon it, will not.

PARKE, B.—The report of *May* v. *Selby*, in 4th Scott, is the most full as to the reasons of that decision. *Erskine*, J., says: "These preliminary expenses are never allowed. Surveyors are often sent to measure work in order that they may be qualified to give evidence as to its value. I never heard of the expense of such attendances being costs in the cause." The Courts still adhere to the general rule laid down in that case, on account of the extreme difficulty of discriminating in questions of this kind.

ROLFE, B.—I agree with the judgment pronounced by *Erskine*, J., as reported in 4th Scott.

Rule refused (*a*).

(*a*) 2 Bing. 75.
(*b*) 4 M. & Gr. 142; 4 Scott, N. S., 727.
(*c*) See *Bastard* v. *Smith*, 10 Ad. & E. 213.

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May 1.

WARD v. AUDLAND, sued as Executor of WHITELOCK.

Covenant. W., by voluntary conveyance, assigned to plaintiff, his executors, &c., his furniture, effects, &c., in trust, to the use of W., the settler, for his life, and at his death, in equal moieties, to the use of two nieces of W., named. Covenant by W., for himself and his heirs and executors, to do all further reasonable acts and things for further and better assigning and transferring the said furniture, &c., to plaintiff, on the same trusts as by plaintiff or his counsel should be reasonably advised. W. was in possession of the furniture, &c., till his death. On that event, defendant, his executor, became possessed, and sold the whole. Plaintiff sued the defendant, as executor of W., on the above covenant for further assurance, averring, in his declaration, that it was at no time necessary to sell any of W.'s chattels to pay any debt of W., and that there were no creditors of his who could impeach the validity of the indenture, and assigning, by way of breaches, first, that defendant refused to deliver possession of the furniture to plaintiff; and, secondly, that defendant converted and sold the same, not alleging that he sold it in market overt:—*Held*, that the plaintiff was entitled to recover, at least on the last breach, the value of the furniture possessed by W. from the time of his executing the deed to his death, and afterwards sold by the defendant as his executor, though trover might have been sustained for the same cause of action.

COVENANT. Declaration of 24th of October, 1845, stated that before and at the time of the making of the indenture thereinafter mentioned, and in the lifetime of the said W. Whitelock, the said Whitelock was possessed as of his own property of divers household goods, furniture, books, plate, linen, and china, and other property and effects, and thereupon heretofore, to wit, on the 7th of July, 1826, by a certain indenture then made between the said W. Whitelock of the first part, W. T. Ward, Margaret his wife, and M. Hervey, of the second part, and the plaintiff of the third part (profert of the deed), after reciting &c., and that the said W. Whitelock being mindful and desirous of making a provision for the said W. T. Ward and Margaret his wife, and M. Hervey, the said M. Ward and M. Hervey being his nieces and only near relatives, had proposed to assign and transfer all and singular his personal estate and effects for the benefit of the said W. T. Ward and Margaret his wife, and M. Hervey, after the death of the said W. Whitelock, in manner thereinafter mentioned, it was witnessed that, for carrying such mind and desire into effect and execution, and for and in consideration of the natural love and affection which the said W. Whitelock had and bore for and towards his said nieces, and for their advancement and maintenance in life, and in consideration of 10*s.* &c. to him the said W. Whitelock in hand paid by the said plaintiff at or before the execution of

the said indenture, the receipt whereof was thereby acknowledged, and also for divers other good causes and considerations him thereunto moving, he the said W. Whitelock by the said indenture did give, grant, bargain, sell, assign, transfer and set over unto the said plaintiff, his executors, administrators, and assigns, amongst other things, all and singular his the said W. Whitelock's household goods and furniture, plate, linen and china, live and dead stock, effects, books, prints, and pictures, and all other the personal estate and effects whatsoever, whereof the said W. Whitelock then was or should or might at any time or times thereafter be possessed of, interested in, or entitled unto, and in whose hands, custody, or power the same or any of them or any part thereof were then or might thereafter come to or be, with their and every of their appurtenances, and all the estate, right, title, interest, equity of redemption, property, claim, and demand whatsoever of him the said W. Whitelock, of, in, to, or out of the said estate and effects or any part thereof, to have and to hold, receive, take, and enjoy all and every of the said goods, chattels, and effects, and all and singular other the estate and effects thereinbefore granted and assigned, or mentioned and intended so to be, with their and every of their appurtenances, unto the said plaintiff, his executors, &c., nevertheless upon the trusts, and to and for the uses, ends, and intents and purposes following, that is to say, to the use and behoof of the said W. Whitelock for and during the term of his natural life, and from and immediately after his decease, then as to, for, and concerning one moiety or equal half part thereof, to the use and behoof of the said W. T. Ward and Margaret his wife, their executors, &c. absolutely; and as to, for, and concerning the other moiety or equal half part thereof, to the only absolute use and behoof of the said M. Hervey, her executors, &c. absolutely, subject nevertheless to a certain proviso therein contained, to the effect that in case of the said W. T. Ward and Margaret his wife, or the said M. Hervey, dying in the

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WARD *v.* AUDLAND, sued as Executor of WHITELOCK.

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COVENANT. Declaration of 24th of October, 1845, stated that before and at the time of the making of the indenture thereinafter mentioned, and in the lifetime of the said W. Whitelock, the said Whitelock was possessed as of his own property of divers household goods, furniture, books, plate, linen, and china, and other property and effects, and thereupon heretofore, to wit, on the 7th of July, 1826, by a certain indenture then made between the said W. Whitelock of the first part, W. T. Ward, Margaret his wife, and M. Hervey, of the second part, and the plaintiff of the third part (profert of the deed), after reciting &c., and that the said W. Whitelock being mindful and desirous of making a provision for the said W. T. Ward and Margaret his wife, and M. Hervey, the said M. Ward and M. Hervey being his nieces and only near relatives, had proposed to assign and transfer all and singular his personal estate and effects for the benefit of the said W. T. Ward and Margaret his wife, and M. Hervey, after the death of the said W. Whitelock, in manner thereinafter mentioned, it was witnessed that, for carrying such mind and desire into effect and execution, and for and in consideration of the natural love and affection which the said W. Whitelock had and bore for and towards his said nieces, and for their advancement and maintenance in life, and in consideration of 10*s.* &c. to him the said W. Whitelock in hand paid by the said plaintiff at or before the execution of

the said indenture, the receipt whereof was thereby acknowledged, and also for divers other good causes and considerations him thereunto moving, he the said W. Whitelock by the said indenture did give, grant, bargain, sell, assign, transfer and set over unto the said plaintiff, his executors, administrators, and assigns, amongst other things, all and singular his the said W. Whitelock's household goods and furniture, plate, linen and china, live and dead stock, effects, books, prints, and pictures, and all other the personal estate and effects whatsoever, whereof the said W. Whitelock then was or should or might at any time or times thereafter be possessed of, interested in, or entitled unto, and in whose hands, custody, or power the same or any of them or any part thereof were then or might thereafter come to or be, with their and every of their appurtenances, and all the estate, right, title, interest, equity of redemption, property, claim, and demand whatsoever of him the said W. Whitelock, of, in, to, or out of the said estate and effects or any part thereof, to have and to hold, receive, take, and enjoy all and every of the said goods, chattels, and effects, and all and singular other the estate and effects thereinbefore granted and assigned, or mentioned and intended so to be, with their and every of their appurtenances, unto the said plaintiff, his executors, &c., nevertheless upon the trusts, and to and for the uses, ends, and intents and purposes following, that is to say, to the use and behoof of the said W. Whitelock for and during the term of his natural life, and from and immediately after his decease, then as to, for, and concerning one moiety or equal half part thereof, to the use and behoof of the said W. T. Ward and Margaret his wife, their executors, &c. absolutely; and as to, for, and concerning the other moiety or equal half part thereof, to the only absolute use and behoof of the said M. Hervey, her executors, &c. absolutely, subject nevertheless to a certain proviso therein contained, to the effect that in case of the said W. T. Ward and Margaret his wife, or the said M. Hervey, dying in the

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lifetime of the said W. Whitelock, leaving lawful issue, that then the share of the party dying should go to the use of the issue of such party as therein mentioned; and the said W. Whitelock did thereby, for himself, his heirs, executors, administrators, and assigns, covenant, &c. to and with the plaintiff, his executors, &c., that he the said W. Whitelock, his heirs, executors, &c. and every other person or persons having or claiming, or who should or might have or claim, any estate, right, title, or interest at law or in equity of, in, to, or out of the said personal estate and effects or any part or parcel thereof intended to be thereby assigned and transferred by, from, or under him, them, or any of them, should and would from time to time and at all times thereafter, at the request of the said plaintiff, his executors, &c., make, do, acknowledge, sign, pass, and execute, or cause and procure to be made, done, acknowledged, signed, passed, and executed, all and any such further and other lawful and reasonable acts, deeds, things, devices, transfers, assignments, releases, conveyances, and assurances in the law whatsoever for the further and better assigning and transferring all and singular the said personal estate and effects thereby assigned and transferred or intended so to be, and every part thereof, with the appurtenances, unto the said plaintiff, his executors, &c. upon the trusts aforesaid, be the same by any lawful ways or means whatsoever, as by the said J. Ward, his executors, &c. or the person or persons for the time being entitled, or his or their counsel learned in the law, shall be lawfully and reasonably advised or devised and required, as by the said indenture, &c. (reference to the indenture). And the plaintiff saith, that after the making of the said indenture, and in pursuance of the trusts thereof, the said W. Whitelock remained and continued in the possession of all and singular the said household furniture, goods, and chattels of which the said W. Whitelock was so possessed and entitled to as aforesaid at the time of the making of the said indenture, and which were comprised

in and assigned thereby, from the time of making the said indenture until and at the time of his death, and that heretofore, to wit, on the 27th of June, 1836, the said W. Whitelock died so possessed thereof, leaving the said W. T. Ward and Margaret his wife him surviving. And the plaintiff further saith, that the said M. Hervey died after the making of the said indenture, and in the lifetime of the said W. Whitelock, to wit, on the 20th of January, 1833, leaving issue two children, i. e. W. Whitelock and D. Hervey her surviving, and which said two children also survived the said W. Whitelock and are still living; and the plaintiff further saith that, after the said W. Whitelock's death, to wit, on the 10th of July, 1836, the said household furniture, plate, linen, china, and other goods and chattels of which the said W. Whitelock was so possessed of and entitled to as aforesaid at the time of making the said indenture, and which were comprised in and assigned thereby, and which were of great value, to wit, of the value of £500, came to and were in the hands and possession of the defendant, then being executor of the said W. Whitelock. Nevertheless, the plaintiff in fact saith, that the defendant, as such executor of the said W. Whitelock as aforesaid, did not nor would from time to time and at all times after the death of the said W. Whitelock, at the request of the plaintiff, make, do, acknowledge, sign, pass, and execute, or cause and procure to be made, done, acknowledged, signed, passed, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, transfers, assignments, releases, conveyances, and assurances in the law whatsoever, for the further and better assigning and transferring the said household furniture, goods, chattels, and effects comprised in and assigned and transferred by the said indenture, or intended so to be, unto the plaintiff, upon the trusts mentioned in the said indenture, by any lawful ways or means whatsoever, as by the said plaintiff were lawfully and reasonably advised and

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linen, china, books, prints, pictures and effects, which were upon and about the house and premises of the testator, W. Whitelock, deceased, at Sulhamstead, in the county of Berks, at the time of his death, and belonging to him at the time of executing the indenture of the 7th July, 1826.

At the trial before *Pollock*, C. B., at the Middlesex Sittings after Michaelmas Term, 1846, the deed of July 1826 was proved, and the death of the testator in 1836. The probate of his will, made in 1833, was produced, by which he vested his whole property in the defendant and another, in trust for the children of M. Hervey, who had died since 1826. Two bills in Chancery, filed by the plaintiff against the defendant and others, to establish the deed, had been dismissed with costs (*a*). A third bill was afterwards filed by him, and a report made by the Master, that the property included in the indenture of the 7th July, 1826, consisted of certain mortgage securities, a policy of insurance on the life of W. Whitelock, and a quantity of household furniture, plate, linen, china, live and dead stock, and effects, books, two portraits of himself, with a schedule, stating the property of the testator included in the indenture, which came to the hands of the defendant as his executor. The only two items material in this case were, "Produce of sale of furniture, 244*l.* 14*s.* 2*d.*;" "certain plate, books, and other effects remaining unsold, valued at 86*l.* 11*s.*" The Master also found that there was other property belonging to the testator at the time of his death, which was not included in the indenture, and that the testator owed no debts. This bill also was dismissed with costs, on the 27th February, 1845 (*b*). A subsequent amicable suit for administration of the assets was commenced: *Hervey* v. *Audland and Others, Ex parte Ward* (*c*). The plaintiff

(*a*) See 8 Simons, 571; C. P. Cooper's R. 146.

(*b*) See 14 Law J., Chanc., 145, Rolls.

(*c*) 16 April, 1845, cor. Shadwell, V. C., 9 Jurist, 419.

petitioned to be permitted to go in before the Master to prove a specialty debt, by the executor's alleged breach of covenant. This was refused, with costs, but leave was given to him to sue at law. The plaintiff confined his case to the goods on the settlor's premises in July, 1826 (*a*), and their identity with the goods admitted to be sold by the defendant being also admitted, a verdict was given for the plaintiff on all the issues, leave being given to the defendant to move to enter a verdict on either issue, or to reduce the damages. However, in Hilary Term, 1847, *Watson* obtained a rule to arrest the judgment, on the ground of there being no averment in the declaration, that the act required to be done by the covenant for further assurance was advised by the plaintiff or his counsel (*b*).

Martin and *Hayes* now shewed cause.—[*Parke*, B.—The question is, whether, under the deed by which the chattels in question were settled on the grantor for life, and disposed of after his death to his nieces, there was such an implied contract to deliver them up in that event, as, on his executors' failure so to do, amounted to a breach of the covenant in the deed for further assurance by the settlor and his executors.] The plaintiff contends that the words of the indenture amount to a covenant by the grantor, binding his executors to deliver up these chattels at his death to his nieces. As soon as the executors claimed a right to retain the chattels adversely to the parties entitled under the deed, that covenant attached and came into operation. The settlor had no debts, but as his conveyance was volun-

(*a*) See *Lane* v. *Thornton*, 1 C. B. 379.

(*b*) See 9 Bythewood & Jarman's Conveyancing, by Sweet, 3rd edit., 399; *Bennet's case*, Cro. Eliz. 9; *King* v. *Jones*, 5 Taunt. 418; *Graham* v. *Stone*, 1 East, 632; *Warn* v. *Bickford*, 9 Price, 43.

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tary, it was material that the possession of the chattels settled should go along with the deed: *Twyne's case* (a). No deed was necessary to transfer the chattels, and it may be assumed to be valid. [*Rolfe*, B.—Suppose real estate had existed?] If the deed had been intended to operate on real property, by way of feoffment and livery of seisin, and no seisin had been delivered at the death of the vendor, so that the heir claimed the land, the heir would have been liable to perform the covenant for further assurance, by making livery on the demand of the trustee named in the deed. In this case of personal property the settlor's covenant is expressed to be by himself and his executors. Now the sale and conversion by them could not be an act done for the further and better assuring the chattels to the plaintiff, on the trusts of the deed, by any lawful means which he might reasonably require. [*Platt*, B.—If the goods were placed by the defendant in the hands of a third party, trover would lie against that third party; for, under the circumstance to which the defendant owed his possession of them, he could not, by selling out of market overt (b), confer any property in them contrary to that created by the deed, *Cooper* v. *Willomatt* (c): for it was incumbent on the purchaser to see that the vendor had a good title. In *Twyne's case*, the conveyance of the goods was binding as between the parties. *Parke*, B.—No doubt the plaintiff might have sued in trover. In *Irons* v. *Smallpiece* (d), it was held that the verbal gift of a chattel, without actual delivery, does not pass the property to the donee, *Abbott*, C. J., saying, "By the law of England, in order

(a) 8 Co. 80 b.

(b) *Loeschman* v. *Machin*, 2 Stark. N. P. C. 311. Acted on in 1 C. B. 672.

(c) 1 C. B. 672. A. sold furniture, &c., to B. by bill of sale, and B. allowed A. to use it at a weekly rent, he undertaking to deliver them on demand. Afterwards A. sold and delivered it to C., a bonâ fide purchaser. B. maintained trover against C.

(d) 2 B. & Ald. 557.

to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." That is not correct.] In *Lunn* v. *Thornton* (*a*), *Maule*, J., observes on Lord *Tenterden's* opinion as remarkable, and leaves it to be inferred that the assignment might be otherwise than by deed. [*Parke*, B.—Grass and corn growing and standing on the ground, and fruit on trees, are grantable (*b*). *Pollock*, C. B.—If a third person was in possession of the goods, the defendant might have given an order to deliver them to the plaintiff.] Had he refused to give such order to deliver, or, having pledged them, neglected to redeem and deliver them to the plaintiff, he would be liable in trover, but the right so to sue is merely concurrent with his right to sue in covenant. The settlor's object was that the grantors should have the goods themselves; but the defendant by his own act, viz. the sale and conversion, has absolutely defeated that object, and has rendered it as impossible to perform the covenant as if he had burnt them. [*Platt*, B.—The covenant must have the same meaning, whether enforced against the settlor or his executor, the defendant. If the settlor's possession of these goods was the same as that of the plaintiff, why was not the possession of the settlor's executors also that of the plaintiff?] The act of conversion is by the executor himself, the party bound by the covenant, and is therefore decisive. By the deed the defendant is to do and execute all such acts, deeds, and things as by the plaintiff might be required for transferring as well as assigning the chattels. Now "deed" and "thing" cannot mean deed only, and the transfer, being of chattels, might be accomplished by mere handing over without deed. [*Parke*, B.—Had the goods been settled on the plaintiff for the life of another, the plaintiff would say they must be delivered up to him. *Platt*, B.—The subject-matter of

(*a*) 1 C. B. 679. (*b*) Shep. Touchst., tit. Grant, 245.

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transfer being personalty, assigns the proper meaning to the words used. *Parke*, B.—Would a refusal by the defendant to deliver up the goods be a breach of this covenant?] *Napper* v. *Alington* (*a*), and *Warn* v. *Bickford* (*b*), shew that on a covenant to do all such further and reasonable acts and things for the further and better granting and securing as should be required, an act not within it, e. g. the covenantor's refusal to direct his trustees to raise money on mortgage, for the purpose of paying a sum of money as covenanted, not being an act of molestation, is not a breach of the covenant. Here the not doing the reasonable act of delivering up the goods is a breach of the covenant declared on, and the question is whether covenant may be maintained, not whether trover might have been brought. [*Parke*, B.—Many acts lawful if done by strangers, would be illegal if done by parties to a deed. You say the intention of the parties was that the goods themselves should be delivered up after the settlor's death, and that a further covenant of quiet enjoyment is to be implied; but if so, then the damages having been assessed on the whole, there could only be a venire de novo (*c*).] Still it would prevent the arrest of judgment; for the defendant's sale of the goods, by contravening the very object of the deed itself, prevented him from confirming the plaintiff's title as it required. In Comyns's Digest, tit. "Covenant" (A. 2), it is said: "Any words in a deed which shew an agreement to do a thing, make a covenant. So, if it be said that it is *agreed* A. shall pay 10*l.* to B. for his goods, this amounts to a covenant by B. to deliver his goods, for *agreed* is the word of both" (*d*). [*Parke*, B.—*Dering* v. *Farington* (*e*) shews, that an assign-

(*a*) 1 Eq. Cas. Abr. 166.

(*b*) 9 Price, 43; judgment arrested for ill-assignment of breach.

(*c*) *Martin* resisted a venire de novo, as being against the agreement of counsel at the trial.

(*d*) Citing 1 Rol. Ab. 518, l. 60; 1 Saund. 322; 1 Siderfin, 423; Sir T. Raym. 183; S. C., *Pordage* v. *Cole*, 1 Saund. 319.

(*e*) 1 Freeman, 368. Cited by *Holt*, C. J., 2 Ld. Raym. 1242; 3 Keble, 204.

ment and transfer of a chattel creates an implied covenant against the assignor and all who claim under him, though it may convey no title to the grantee.] From *Twyne's case* till *Edwards* v. *Harben* (*a*), it was held that the absence of possession of chattels by a grantee after conveyance of them to him was no more than evidence of fraud. That is now settled law. [*Parke*, B.—In *Edwards* v. *Harben* (*a*), it was carried further, being said by *Buller*, J., to constitute fraud. That was acted on, and introduced great confusion into the law for some years, till it was settled in many cases, among the rest in *Martindale* v. *Booth* (*b*).]

Cowling, in support of the rule.—Trover was maintainable in respect of the subject-matter of both breaches; the first being that the defendant refused to deliver possession of the goods to the plaintiff; and the second, that the defendant converted and sold them. The present action of covenant was intended to elude the Statute of Limitations as applicable to the action of trover, and to secure the fruits of it in another shape, viz. against the defendant as executor (*c*). If the defendant is liable as such in this action, he might plead plene administravit and defeat it, or if he has not fully administered, must pay from the assets, whereas in trover he would have been personally responsible for his own act. The declaration shews no breach of covenant, there being no sufficient averment that delivery was a reasonable act for further assigning to the plaintiff, or that his counsel required it (*d*). [*Parke*, B.—Had this been a grant in trust for the grantor himself pur auter vie, and that life had dropped in the grantor's life, would he have been afterwards liable for breach of this covenant?] It was never covenanted or intended that the plaintiff, or any but the settlor and grantees, should have possession of the goods

(*a*) 2 T. R. 587.
(*b*) 3 B. & Ad. 498.
(*c*) See 1 C. P. Cooper's Ch. Rep. 168.
(*d*) See 1 Jarman's Wills, Remarks, &c., Obs. 2.

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settled. [*Parke*, B.—Was he not to have it at the settlor's death, in order to divide it in moieties to the parties entitled, they not being tenants in common?] The deed nowhere stipulates or contemplates possession by the plaintiff for any purpose. He is to do what counsel advises. That shews it is a covenant for doing anything necessary to complete the title, e. g. if the settlor had only a partial interest or equity of redemption. Then the non-delivery charged in the first breach is no breach of the covenant for better assigning and transferring. If that covenant included the non-delivery of the chattels, it would have supported an action against the settlor himself, though entitled to the possession for life. The non-delivery might have been a breach of a covenant for quiet enjoyment, had any existed or been intended. This is a limited covenant for title, and as such confined to rightful acts of persons claiming by legal title, whereas a covenant for quiet enjoyment extends to acts as well of tort-feasors as of all others: *Dudley* v. *Folliott* (*a*). The sale, if illegal, was an act committed by the defendant in his individual capacity, yet the action is an attempt, by suing him in a representative character, to make the assets of the deceased settlor liable for the defendant's tort—*Wigley* v. *Ashton* (*b*), *Corner* v. *Shew* (*c*)—by enabling the plea of plene administravit to be pleaded to it. [*Parke*, B.—This was clearly a covenant against the grantor's own act. Had he sold the goods, it would have been a breach, for he could not derogate from his own act. *Dering* v. *Farington* (*d*) is in point.] There the covenantor himself was sued, which is a material distinction. Suppose the settled chattel to have been a horse, which the settlor afterwards shot, could the defendant have been liable for the individual act of the settlor? [*Pollock*, C. B.—Had the defendant been sued in his individual capacity, he would

(*a*) 3 T. R. 504.
(*b*) 3 B. & Ald. 101.
(*c*) 3 M. & W. 350.
(*d*) 1 Freeman, 368.

have been liable in trover, but, being sued as executor of the grantor under the deed, he is liable in covenant.] That is the doubt. Suppose a third person to have burnt the chattels between the grantor's death and the period of delivering them up, would the defendant, as executor, then have been liable? This act, being tortious, was not the subject of an action ex contractu, but of trover. This argument more especially applies to the second breach, as to which it is said the defendant, by the sale, has put it out of his power to perform his covenant: *Ford* v. *Tiley* (*a*). Something should be shewn which it was the defendant's duty to do under the covenant. There is no averment of any sale in market overt, or of any demand of the goods back. *Twyne's case* (*b*) shews that possession under the deed may be essential to its validity if the grant be fraudulent; but many cases shew that want of such possession, if consistent with the deed, is not even evidence of fraud. The effect of *Dering* v. *Farington* is, that the assignment of a chose in action, as a bond, though inoperative in point of interest, yet is a covenant that the assignee shall recover the money to his own use, so that Dering was entitled to have in possession the £500 which was to be given him by Farington. To imply such a covenant here would contravene the parties' intention. The defendant was not to divide the chattels as executor.

POLLOCK, C. B.—We entertain no doubt that one breach is properly assigned, and the record may be amended by entering up judgment on that breach only. The rule is only to arrest the judgment, and will be discharged on the ground of one breach being well assigned.

PARKE, B.—The rule must be discharged. This case falls directly within what Lord *Hale* lays down in *Dering*

(*a*) 6 B. & Cr. 325. (*b*) 3 Rep. 80 b.

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v. *Farington* (*a*). The law does not imply warranty of present title to assign, in cases of personal chattels; but a covenant to do all reasonable acts for further and better assigning and transferring chattels conveyed by the deed, means merely that neither the covenantor nor those claiming under him will do anything to interrupt the quiet enjoyment of the chattels by the parties contemplated by the deed. Here, by the defendant's sale, he did interrupt all such enjoyment. The defendant is in the same position, as if the present covenant for further assigning and transferring the chattels had been for the grantor and covenantor to hold them pur auter vie, and he had then himself destroyed them. In that case, according to Lord *Hale*, the covenant could be enforced as such against the grantor and all parties claiming under him. In the last breach the defendant is charged with keeping and retaining possession of the chattels, "claiming the ownership thereof as executor as aforesaid," that is, under the testator, who is the covenantor. If *Dering* v. *Farington* is law, the covenant has been broken,

(*a*) 1 Freeman, 368; 1 Mod. 113; 3 Keble, 304; 6 Vin. Abr. 381. Plaintiff declares that defendant vendidit, assignavit, and transposivit 500*l.* to him that was owing to defendant by J. S., and that he did not permit him to receive it. Two questions were moved: first, whether these words should amount to an implied covenant, and it was argued that they should not, though it was in case of an interest passed or a possession given. (3 Cro. 157; 1 Leon. 179; 1 Roll. 519; *Bedford* v. *Bull*). Secondly, admitting they would amount to an implicit (implied) covenant, yet this being to transfer a chose in action, and so void, the implied covenant is also void. (Owen, 136.) Per *Hale*, C. J.: "Although these words may not amount to an implicit (implied) covenant against eigne titles, yet they may be good against the party himself and his acts." Thus stated by Lord *Holt*, C. J., in Lord Raym. 1242: "So if a man assigns a bond to J. S., and afterwards receives the money of the obligor, if he do not immediately pay it over to the assignee, the assignee may maintain an action of covenant against him on the word *assignavit*, and that was the case of *Deering* v. ———." Also stated by Lord *Holt*, Lord Raym. 683, and cited arguendo.

and the damages are payable out of the testator's assets. I have some little doubt as to the other breach.

ROLFE, B.—Even if I entertained any doubt as to one of the breaches, it would be absurd to have another trial merely to apportion the damages afresh.

PLATT, B.—As to the last breach, I quite agree with my brothers; but as to the other, I have very considerable doubt whether the covenant is not merely for title, as argued by Mr. *Cowling*.

Rule discharged.

JENKINS and Others *v.* MORRIS, FINNEY, and JONES. *May* 4.

Indorsee against the three defendants as acceptors, of a bill of exchange drawn on "E. M. and others, trustees of Clarence Temperance Hall, Liverpool," and accepted thus:—"Accepted, E. M." The three defendants, with E. M. and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf:—*Held*, that the defendants were bound by the acceptance, though it did not shew on the face of it that E. M. intended to accept, not individually, but for himself and four others.

ASSUMPSIT on a bill of exchange, by indorsees against acceptors.—The bill was as follows:—

"£34 1*s.* 5*d.* Liverpool, 9th May, 1846. Three months after date pay to our order, in London, the sum of thirty-four pounds one shilling and fivepence, value received in slating. William Harrison, Robert Harrison. To Mr. Edward Mundy and others, trustees of Clarence Temperance Hall, Liverpool. Accepted payable at Messrs. Barclay & Co., London, Edward Mundy. Indorsed—Pay to the order of Messrs. Jenkins & Wood. William Harrison, Robert Harrison."

Pleas by defendant Morris, first, that defendants did

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not accept; secondly, that W. and R. Harrison did not make the bill.

Similar pleas by the other defendants.

At the trial, at the last Liverpool Assizes, before *Rolfe*, B., it appeared that the three defendants, with Mundy, the acceptor, and one Stephenson, were trustees of certain persons who had united for the purpose of building the Clarence Temperance Hall in Liverpool. All the five trustees had, by written order, employed William Harrison, one of the drawers, to slate their building. Having slated it, he attended a meeting of the society on the day the bill was given, and applied for £10. The trustees conferred, and a bill being mentioned, one of the defendants said, as to the bill, they could not refuse it; and the defendant Morris added, that they should get a mortgage on the Hall in a month, and then the bill should be paid. The bill was accepted by Mundy, and given to W. Harrison, having been seen by all three defendants.

For the plaintiffs it was, on this evidence, insisted that the bill, by its context, shewed the acceptance to have been on behalf of all the trustees. The defendant Morris only appeared by counsel at the trial. For him it was contended, that the acceptance, being by Mundy only, and in his own name only, bound him only, and not the defendants. There being no partnership between them, but it being part of the plaintiffs' evidence that they were trustees of a society or partnership, the learned Baron told the jury that the question in the cause was, whether Mundy, who had in fact accepted the bill, had authority from all the trustees to accept it on their behalf(*a*). The jury found that he had such authority to accept. Verdict for the plaintiffs for the amount of the bill, the defendant Morris having leave to move to enter

(*a*) See *Faith* v. *Richmond*, 11 Ad. & E. 339.

a nonsuit or a verdict.—On a former day in this term (April 16),

Crompton moved according to the leave reserved.—The question of authority from the trustees, as put to the jury, did not arise in the cause; for nothing on the face of the bill shews that Mundy, who accepted, professed to bind the defendants, or had authority from all the trustees to accept. At all events, his intention to accept for himself and four others should have appeared on the bill. [*Parke*, B.—If a bill be drawn on A. and B., they must accept, and appear on the bill to do so. The only proof here was, that Mundy, who accepted, had authority to bind his co-trustees.] The trustees were not partners in a trading firm; and it could only be as such partners that either of them could bind the rest by his signature to a bill. But, taking them as such partners, the acceptance is not sufficient. In a modern treatise (*a*) it is said: "The law presumes that each partner in trade is intrusted with a general authority in all partnership affairs. Each partner, therefore, by making, drawing, indorsing, or accepting negotiable instruments in the name of the firm, and in the course of the partnership transactions, binds the firm, whether he sign the name of the firm, or sign by procuration, or accept in his own name a bill drawn on the firm:" and *Mason* v. *Rumsey* (*b*) is cited. The Court of King's Bench there acquiesced in Lord *Ellenborough's* direction to a jury, that, if a bill of exchange is drawn on a firm, and a person proved to be a partner in the firm accepts it in his own name, he must be taken to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn. That is the only decision in favour of the plaintiffs, and seems to be overruled in *Kirk* v.

(*a*) Byles on Bills, 5th edit., 31, (1847).

(*b*) 1 Campb. 384. See *Galway* v. *Matthew*, Id. 403; 10 East, 264; Bayley on Bills, 4th edit., 44.

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Blurton (*a*), where the Court of Exchequer held, that a partner has no implied authority by law to bind his co-partners by accepting a bill in any other than the true style of the partnership. There a firm consisted of John Blurton and Charles Habershon, but carried on business under the name of "John Blurton" only. Charles Habershon accepted a bill in the name of "John Blurton *and Co.*;" and it was held that John Blurton was not bound by it. Besides, *Mason* v. *Rumsey* occurred before the enactment of 1 & 2 Geo. 4, c. 78, s. 2, that acceptances, to be valid, must be in writing. That act meant, that the acceptor should shew on the bill itself whether he accepted for himself alone, or for himself and others (*b*). The direction of the bill to Mr. Edward Mundy and others, trustees, &c., is only descriptio personæ, intended to point out each individually, not as partners. This case more resembles *Pinkney* v. *Hall* (*c*), thus stated in Buller's Nisi Prius, 270: "In the case of two joint traders, the acceptance of one will bind the other; but if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him, and not the rest." [*Pollock*, C. B.—Primâ facie, no doubt no person can, by his own acceptance, bind another, unless they are partners in trade; but in a trading partnership, an authority to each partner to draw, accept, and indorse bills is implied. This bill is directed to a firm. That is so far a matter of fact. Had the acceptance been simply "accepted," it would have been good. The question here is, whether the acceptance is invalidated by Mundy's adding his name to it. If it is, it must be on the ground that he meant only to bind himself, which would be contrary to the finding of the jury. Does this acceptance mean more than that Mundy is the party who did and accomplished it, i. e. accepted, for the others?]

(*a*) 9 M. & W. 284.
(*b*) See Byles on Bills, 5th edit., 138. (*c*) Salk. 126.

It is enough to say that, on the bill, it is ambiguous whether he meant to accept the bill for himself only, or for himself and four others.

Cur. adv. vult.

The judgment of the Court was this day delivered by

POLLOCK, C. B.—We are of opinion that no rule should be granted in this case. The bill is drawn on "Mr. Edward Mundy and others," adding their name of office, "Trustees of Clarence Temperance Hall, Liverpool." The defendants, with Mundy and another, were those trustees. Mundy accepted the bill, and the jury found that he had authority from all the trustees to do so. Then his acceptance did not import that he accepted merely as an individual, but that he was the party whose hand performed that duty by direction of the rest; and the mere fact that he needlessly added his name to the acceptance made no difference.

Rule refused (*a*).

(*a*) See *Faith* v. *Richmond*, 11 Ad. & E. 339; *Wilks* v. *Back*, 2 East, 132.

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RIDDLE, Executor of HALL, deceased, *v.* THE PROPRIETORS OF THE GRANTHAM CANAL NAVIGATION COMPANY (*a*).

A plaintiff obtained a verdict, subject to a special case, on the argument of which he obtained judgment in this Court. The defendants having liberty to turn the case into a special verdict, did so, and brought a writ of error into the Exchequer Chamber. Before the argument in that Court, the plaintiff died, having made R. his executor. In December, 1845, the judgment of this Court was affirmed in the Exchequer Chamber. The defendants sued out a writ of error into the House of Lords, and assigned errors thereon; and, on the 6th of March, 1846, petitioned the House that R. might be made a party to the writ of error. On the 11th of May, the House of Lords ordered the record to be remitted to this Court. On the 24th of August, the defendants again petitioned the House of Lords that R. might be made a party to the judgment: but no order was made thereon. On the 18th of November, R. sued out a scire facias to have execution.

The Court refused, on the application of the defendants, to stay all proceedings under the scire facias, and allowed R. to sign judgment, with a stay of execution for six weeks, to enable the defendants to sue out a fresh writ of error.

COWLING had obtained a rule, calling upon the plaintiff to shew cause why all proceedings under the scire facias issued in this cause, for the purpose of having execution, should not be set aside, and why in the meantime proceedings should not be stayed. It appeared from the affidavits, that in 1842 the plaintiff's testator, Hall, brought an action to recover back from the defendants the sum of 3*l.* 12*s.* 6*d.*, which had been paid by him to them for tolls upon the navigation, and obtained a verdict, subject to the opinion of this Court upon a special case. The case was argued in Trinity Term 1844 (*b*), when judgment was given for the plaintiff Hall, with liberty to the defendants to turn the case into a special verdict, which was done accordingly, and the defendants brought a writ of error. On the 12th of August, 1845, the plaintiff Hall died, having by his will appointed the present plaintiff, Riddle, his executor. On the 1st of December, 1845, the judgment of this Court was affirmed in the Exchequer Chamber (*c*). Hall's will was proved by the plaintiff in the Prerogative Court at York, on the 19th of December, 1845, and in the Prerogative Court of Canterbury on the 19th of May, 1846; but the defendant's attorney did not know, until the 23rd of October last, that the will had been proved at Canterbury. On the 30th of January, 1846, the defendant sued out a writ of error on

(*a*) Decided in Hilary Term (Jan. 12).

(*b*) 13 M. & W. 114.

(*c*) 14 M. & W. 880.

the judgment, and delivered the writ, with the transcript of the record, into the House of Lords, and assigned errors thereon on the 3rd of February, 1846. On the 6th of March, the defendants presented a petition to the House of Lords, stating that they could not prosecute the writ of error until the personal representative of Hall should be before the House, and praying that Riddle might be made a party to the writ of error, and be directed to plead and rejoin. On the 11th of May, the Lords ordered the record to be remitted to this Court, on the ground that the writ of error could not be proceeded with unless the representative of Hall were made parties to the record. On the 24th of August, the defendants presented another petition to the House of Lords, stating that the agent of Hall had threatened to issue execution against them, and praying, either that the representative of Hall might be made a party to the judgment, and that, in the meantime, he might be restrained from issuing execution, or that the House would discharge the order of the 11th of May, and, in lieu thereof, direct the record in the Exchequer to be amended, by making the representative of Hall a party to the judgment, and that it be returned to them. This petition was referred to the appeal committee, and no order or report had yet been made thereon. On the 10th of November, the plaintiff, Riddle, sued out a writ of scire facias, for the purpose of having execution upon the judgment; whereupon the present rule was obtained.

Hugh Hill shewed cause.—This Court will not prevent the plaintiff from proceeding with his scire facias; if he is wrong in doing so, the proper course for the defendants is to make application to the House of Lords. The plaintiff is entitled to the writ for the purpose of perfecting the record: if he issues execution, it will then be time for the defendants to go to the Court. It is obvious, from the proceedings of the defendants, that their object is delay,

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otherwise they would have presented their petition to the House of Lords earlier in the session than the 24th of August.

Cowling, contrà.—The writ of error of the defendants below was perfectly regular, and the death of the defendant in error made no difference in this respect. The defendants have been guilty of no unnecessary delay; their proceedings have been bonâ fide and under advice, and they are entitled to come to the Court in order to prevent execution from issuing against them. [*Parke*, B.—It will probably be necessary for them to sue out a fresh writ of error.]

PARKE, B.—The defendants ask too much by this rule; we ought not to stay the judgment. The rule, therefore, for staying all the proceedings will be discharged, and the plaintiff will have leave to sign judgment, with a stay of execution for six weeks, which will enable the defendants to sue out their writ of error in the House of Lords.

PER CURIAM,

Rule accordingly.

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IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer.*)

THOMAS *v.* HUDSON.

April 28.

The plaintiff having obtained judgment against F. in an action of assault and false imprisonment, sued out thereon a ca. sa., on which F. was taken and committed to the Queen's prison. F. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the keeper of the Queen's prison accordingly. The plaintiff having brought an action against the keeper for an escape:—*Held*, in the Exchequer Chamber, in affirmance of the judgment of the Court of Exchequer, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction.

***Quære*, whether the Court of Bankruptcy has authority under the above acts of Parliament to order a prisoner to be discharged out of custody who has been arrested under a ca. sa., issued on a judgment in an action of tort?**

A WRIT of error having been brought upon the judgment of the Court of Exchequer in this case for the defendant (*a*), it was fully argued in this Court, in Hilary and Trinity Vacations, 1846 (*b*), by *Martin* for the plaintiff, and *Watson* for the defendant. The arguments adduced, and authorities cited, were the same in substance as those in the Court below. The Court having taken time to consider, the judgment was now pronounced by

PATTESON, J.—It is not necessary to decide the first point in this case, viz. whether the learned commissioner had power by his interim order to discharge Foulkes from the judgment at the suit of Thomas, the present plaintiff, which depends on the proper construction to be given to the 6th section of the stat. 7 & 8 Vict. c. 96, inasmuch as

(*a*) 14 M. & W. 353, where the pleadings are set out.

(*b*) Feb. 7th and June 19th, before *Tindal*, C. J., *Patteson*, J., *Coltman*, J., *Coleridge*, J., *Maule*, J., and *Erle*, J.

1847.
THOMAS v. HUDSON.

we are all of opinion on the second point, that, whether the commissioner was right or wrong, he had such jurisdiction in the matter as to distinguish this case from the *Marshalsea case*, and others of the same class; and that the judgment of the Court below on this second point is quite right, both in its result, and in the reasons given for it, with which we entirely agree.

The judgment must therefore be affirmed.

Judgment affirmed.

END OF EASTER TERM.

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TO THE

PRINCIPAL MATTERS.

the river, over which, at certain states of the tide, the vessel of the plaintiff thereinafter mentioned would float, but at others not; that, while the defendant was so possessed of the wharf, the plaintiff was possessed of a vessel then being, by the sufferance and permission of the defendant, at and alongside the said wharf, for reward to the defendant in that behalf; and the defendant then had the management and control of the said wharf, and the mooring and stationing of vessels at and near the same while they were at the said wharf, for the purpose of using the same. Breach, that the defendant unskilfully and negligently placed, moored, and stationed the plaintiff's vessel in the part of the river near the said wharf, and over the said woodwork, and unskilfully and negligently detained the vessel there for a long time, until, on the natural fall of the tide, she fell and lodged against the said woodwork, and was damaged thereby:—*Held*, on error, after verdict and judgment for the plaintiff, (upon a plea denying that the defendant had the management and control of the wharf, and the mooring and stationing of ships alongside it, &c., modo et formâ), that the declaration sufficiently stated a duty in the defendant safely to moor and station the plaintiff's vessel, and a breach of that duty. *Curling* v. *Wood*, 628

AFFIDAVIT.

Addition of Deponents—Jurat.

An affidavit will be rejected which does not contain the proper additions of all the deponents. Where a rule has been obtained on an affidavit, the jurat of which is defective in not containing the names of the respective deponents sworn, pursuant to the rules of the Court of Exchequer, Mich., 37 Geo. 3, and Trin., 1 Geo. 4, the Court will discharge the rule, *with costs*. *Cobbett* v. *Oldfield*, 469

AGREEMENT.

See STAMP.

AGREEMENT FOR LEASE.

See LEASE, 1.

AMENDMENT.

A declaration stated that the plaintiffs were a company incorporated for the purpose of providing steam vessels, and employing the same along the shores of North and South America, in the Pacific Ocean: that the plaintiffs, at the defendant's request, purchased of the defendant, and the defendant sold to the plaintiffs, for the use and supply of the said steam vessels, 485 tons of coals, subject to the conditions that they were "of a suitable quality to be used in steam vessels, and were adapted for all closed furnaces or stove fires where a steady, strong, and lasting heat was desirable; that they would burn with little or no smoke, would make but a small quantity of ashes, would ignite easily with a good draught, would open and swell out, would not cake and unite like the bituminous coal, and would burn without being stirred." The declaration then averred that the defendant promised the plaintiffs that the coals were of a suitable quality to be used in steam vessels, &c., and stated as the breach, that the coals were not of a suitable quality to be used in steam vessels, (negativing the terms of the contract and promise), but, on the contrary thereof, were slow and difficult of ignition, and would not burn in a manner useful or available for the purposes of steam vessels, &c. The defendant pleaded (with other pleas), the general issue, and also that the said coals were of a suitable quality

to be used in steam vessels, &c., (traversing the terms of the breach). Prior to the sale, the defendant delivered to the plaintiffs a printed advertisement or statement, in which the qualities of the coal were described as in the declaration. Upon the sale an invoice was delivered which described the coals as "steam coals." At the trial, it appeared that the coals were unfit for steam vessels, but the plaintiffs failed to prove that the printed statement or advertisement formed any part of the contract. The judge at Nisi Prius having, by consent, referred the question of amendment to the Court:—*Held*, that the Court might amend the declaration, by striking out the allegation of the qualities of the coals, and substituting a statement that the coals were "of fit quality for working steam engines, and generating steam for steam engines." *Pacific Steam Navigation Company* v. *Lewis*, 783

ARBITRATION.

Finality of Award.

An action of trespass brought in the Court of Exchequer by a plaintiff against three defendants, and all matters in difference between the said parties, were referred by order of nisi prius to an arbitrator, a verdict having been taken for the plaintiff; and by another like order, made at the same time, an action of replevin brought in the Court of Queen's Bench, by the same plaintiff against one only of the defendants, was also referred to the same arbitrator. The main question agitated on both sides was, whether or not the plaintiff had in 1842, become tenant to that party who was defendant in both actions. No other tenancy was ever set up, or brought into question before the arbitrator. The reference of the replevin suit was first proceeded in, and the evidence taken in it was, by consent, read over as evidence in the action of trespass. The arbitrator awarded in the action of replevin, that the plaintiff had good cause of action against the defendant, and was entitled to a verdict. In the action of trespass he awarded nothing as to the costs of the action of replevin, or whether at the date of the order of reference of either action a tenancy of the plaintiff to the party, who was defendant in both actions, existed:—*Held*, that the award was good, these matters, if in difference, not having been brought before the arbitrator at the hearings.

The arbitrator had the power of a judge at Nisi Prius. He did not award execution, but ordered the damages and costs to be paid at a stated time and place. That part of the award was held void pro tanto, as surplusage. The plaintiff had replevied in the County Court, but on the sale by the three defendants of the goods replevied, dropped that suit, and brought the action of trespass against them:—*Held*, that as the proceeding in the County Court was not brought before the arbitrator, his award was good, though he had not awarded on it. Whether, on a reference of a cause and "all matters in difference between the said parties," they being A., on the one part, and B., C., and D., on the other, an arbitrator must award on a cause and matter of difference pending between A. and B. only, *quære*. *Rees* v. *Waters*, 263

ARREST.

See BANKRUPTCY, 6.—SUNDAY.

(1). *Under* 1 *&* 2 *Vict. c.* 110, *s.* 3—*Affidavit for—Discharge from.*

1. An affidavit, which states only that the deponent has been informed and believes that the defendant is

about to leave England, without stating from whom the dependent obtained the information, is not sufficient ground for an order for the defendant's arrest.

Under the 6th section of the 1 & 2 Vict. c. 110, where a judge at chambers has ordered a defendant's arrest, the Court out of which the process issues has power, on application directly made to it, to order his discharge, if it thinks the materials before the judge were insufficient, or that he exercised an improper discretion. Upon such application, the party arrested may use affidavits to explain or contradict those on which the order was granted, and those affidavits may be answered by the plaintiff on shewing cause.

The defendant may also take the opinion of another judge as to the propriety of his discharge, and that opinion is in like manner subject to be reviewed by the Court.

Quære, whether, if the judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the prisoner's discharge, as upon an appeal to the Court.

Quære, also, whether, if it appear on the fresh affidavits that the defendant was about to quit England at the time when those affidavits were made, though he was not when the order for his arrest was made, the Court ought to discharge him. *Graham* v. *Sandrinelli*, 191
Talbot v. *Bulkeley*, 193

(2). *Privilege of Herald from.*

2. The Somerset herald-at-arms is one of the Queen's servants in ordinary with fee, and bound to attend her whenever required, as well as on state ceremonials, and is therefore privileged from arrest. *Dyer* v. *Disney*, 312

ASSUMPSIT.

See DAMAGES.

ATTORNEY.

(1). *Bill, form of.*

An attorney is bound to specify in his bill as well every court, as the name of every suit, in which the business charged for was done. Such bill is an entire thing, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation; and the charges in the same bill for equity business, though correctly stated, cannot be recovered. *Ivimey* v. *Marks*, 843

(2). *Bill, Taxation of.*

An attorney's bill may be referred for taxation under 6 & 7 Vict. c. 73, s. 37, though not signed by him, or inclosed in a letter signed by him and referring to it.

Where, by consent of parties, a verdict is taken for a sum named for damages, and also all costs to which plaintiff had been put relating to the subject-matter of the cause, as between attorney and client, without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxation in a liberal way, and not by the ordinary rule. *Young* v. *Walker*, 446

(3). *Order under 6 & 7 Vict. c. 73, s. 43, Effect of.*

A judge's order, made under 6 & 7 Vict. c. 73, s. 43, after taxation of an attorney's bill, ordering judgment to be entered up for the amount found by the Master's allocatur, has the same effect as a rule of court made for

payment of money, under 1 & 2 Vict. c. 110, s. 18. Accordingly, if, after such an order, an action is brought for the amount of the taxed costs, the costs of the writ, &c. will be disallowed. *Griffiths* v. *Hughes*, 809

BANKER.

Relation of Banker and Customer.

Money deposited with a banker by his customer in the ordinary way, is *money lent* to the banker, with a superadded obligation that it is to be paid when called for by cheque; and, consequently, if it remain in the banker's hands for six years, without any payment by him of the principal, or allowance of interest, the Statute of Limitations is a bar to its recovery, (dubitante *Pollock*, C. B.). *Pott* v. *Clegg*, 321

BANKRUPTCY.

See LIMITATIONS (STATUTE OF).

(1). *Reputed Ownership—Sale by Commission—Evidence.*

Books deposited by the owner with a bookseller, kept by him as part of his general stock, and sold by him on commission, do not, on his bankruptcy, pass to his assignees, as being in his "possession, order, or disposition," as reputed owner, within 6 Geo. 4, c. 16, s. 72.

The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to its payment have been reduced into writing. *Whitfield* v. *Brand*, 282

(2). *Mutual Credit.*

The plaintiffs and defendants being, by agreement between them, jointly entitled to the benefits of a charter-party, the plaintiffs assigned their interest in it, by indorsement, to D., their creditor, at the same time giving the defendants notice of such assignment, and afterwards became bankrupts. The assignees of the charter-party having sued upon it in the names of the plaintiffs, the defendants pleaded the bankruptcy of the plaintiffs, by which the right to their choses en action vested in their assignees. Replication, setting forth the assignment by the plaintiffs of their interest in the charter-party to D., and notice to the defendants of that assignment given by them before the bankruptcy of the plaintiffs, and that the plaintiffs sued on account of D. Rejoinder, (after terms to rejoin gratis and issuably had been imposed), setting up the previous agreement between the plaintiffs and defendants, that they should share the benefits of the charter-party, by way of a mutual credit between the parties, on which an account should be stated and one demand set against the other, under 6 Geo. 4, c. 16, s. 50:—*Held*, not issuable, and bad in substance, for, at the time of the bankruptcy, no mutual credit existed between the plaintiffs and defendants. *Boyd* v. *Mangles*, 337

(3). *Authority of Commissioner, under 7 & 8 Vict. c. 96, s. 6—Action against Gaoler for Obedience to Commissioner's Order.*

The plaintiff having obtained judgment against F. in an action of assault and false imprisonment, sued out thereon a ca. sa., on which F. was taken and committed to the Queen's Prison. F. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the keeper of the Queen's Prison accordingly. The plaintiff

having brought an action against the keeper for an escape:—*Held*, in the Exchequer Chamber, in affirmance of the judgment of the Court of Exchequer, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction.

Quære, whether the Court of Bankruptcy has authority under the above acts of Parliament to order a prisoner to be discharged out of custody who has been arrested under a ca. sa., issued on a judgment in an action of tort? *Thomas* v. *Hudson*, 885

(4). *Power of Commitment under* 6 *Geo.* 4, *c.* 16, *s.* 36—*Warrant, Sufficiency of.*

The Court will not discharge from custody a bankrupt committed under the 6 Geo. 4, c. 16, s. 36, for not answering questions to the satisfaction of the commissioner, where they are of opinion that the story contained in his answers is not such as to satisfy a reasonable person of its truth.

The warrant of commitment of a bankrupt, under 6 Geo. 4, c. 16, s. 36, set out the whole of the bankrupt's examination respecting a sum of money which was not forthcoming, and which the bankrupt alleged to have been stolen from him by house-breakers; it then proceeded—"which answers are not, *nor are any of them*, satisfactory to me the said commissioner:"—*Held* sufficient, although some of the answers might, on the face of them, be satisfactory; for that the bankrupt was committed on account of answers which, taken as a whole, were unsatisfactory.

The warrant directed the committal of the bankrupt until he should full answer make, &c. "to the questions so put to him by me as aforesaid:"—*Held* good, although the words of the statute are, "until he shall full answer make, to their satisfaction, to such questions as *shall be* put to him."

The warrant was directed "to the messenger of the said Court, and to his assistants, and to the governor or keeper of her Majesty's gaol of the Castle of York:—*Held* sufficient, without naming the messenger. *Lord, Ex parte*, 462

(5). *Indemnity to Official Assignee against Costs.*

The official assignee of a bankrupt or insolvent is entitled to be indemnified against the costs of an action brought in his name without his authority. *Laws* v. *Bott*, 300

(6). *Suggestion under* 5 *&* 6 *Vict. c.* 122, *s.* 19—*Time for Affidavit of Debt under s.* 8.

The plaintiff sued the defendant for goods sold and delivered, and filed an affidavit of debt in bankruptcy against him, under 5 & 6 Vict. c. 122, for 104*l.* 18*s.* 5*d.* A summons issued against the defendant under that act, but, on his making affidavit that he believed he had a good defence to the demand, was dismissed by the commissioner. The defendant then pleaded a set-off, and at the trial at the assizes proved it to the amount of 29*l.* 5*s.* Verdict for plaintiff for 74*l.* The judge granted a certificate for speedy execution, and on the 7th of August the plaintiff signed judgment, taxed costs, and issued execution. On the 21st of November a rule was granted, under 5 & 6 Vict. c. 122, s. 19, for entering a suggestion on the record, and for compelling the plaintiff to return to the defendant the monies paid by him under the execution, with costs; the ground being,

that the plaintiff had no reasonable or probable cause for making the affidavit of debt in bankruptcy:—*Held*, per Curiam, that the motion was made too late; and by three Barons, (*Parke*, B., hæsitante), that in cases where speedy execution is granted in vacation, under 1 Will. 4, c. 7, and executed before term, the defendant must apply within the first four days of the ensuing term, and, in other cases, before judgment has been signed and execution issued.

Quære, whether, under 5 & 6 Vict. c. 122, the plaintiff had reasonable or probable cause for making an affidavit of debt in bankruptcy to the full amount of the defendant's original debt to him? *Smith* v. *Temperley*, 273

(7). *Order and Disposition.*

Household furniture, linen, and plate belonging to B. were assigned by him, by deed, in contemplation of his marriage, to plaintiffs, in trust, after the marriage to stand possessed thereof during the joint lives of B., the settlor, and his intended wife, for her sole and separate use, independently of B. The marriage took place, and B. afterwards became bankrupt. The settled furniture, &c. was then in the house in which he resided with his wife:—*Held*, that it was not, at the time of his bankruptcy, "in his order and disposition, with consent of the true owners," so as to pass the property in it, under 6 Geo. 4, c. 16, s. 72, to the defendants, his assignees; and the fact of the furniture, &c. not having been the wife's before the marriage was immaterial. *Simmons* v. *Edwards*, 838

BILL OF EXCEPTIONS.

See Writ of Inquiry.

BILLS AND NOTES.

See Guarantie.
Mining Company.
Pleading, I, 1; III, 2, 4; IV, 2.

I. *Promissory Note, what is.*

1. Assumpsit.—Declaration stated, that defendant made his promissory note, and thereby promised to pay to his order 500*l.* two months after date, and indorsed it to plaintiff. Demurrer, on the ground that a note payable to the maker's order was not a legal instrument, and could not be negotiated:—*Held*, that the count was bad, for the instrument declared on as indorsed to plaintiff was not a promissory note, within stat. 3 & 4 Ann. c. 9, s. 1. *Flight* v. *Maclean*, 51

2. The following instrument was held not to be a promissory note:—"*Drury* v. *Vaughan*. In consideration of W. Drury not taking any further proceedings in the above actions, I hereby undertake with the said W. Drury that I will pay him 3*l.* 5*s.* every quarter of a year from this day, until the whole of the principal money now due from Messrs. J. & T. Vaughan to Mr. Drury, 26*l.* 1*s.*, with lawful interest, be paid and satisfied; the first of such quarterly payments to become due on the 30th of October next. It is understood that this undertaking is not to be a release or discharge of the note signed by Messrs. Vaughan to the said W. Drury, on &c., but as an additional security for the above-mentioned amount now due on such note, with the interest." *Drury* v. *Macaulay*, 146

II. *Acceptance by Agent.*

Indorsee against the three defendants as acceptors of a bill of exchange drawn on "E. M. and others, trustees of Clarence Temperance Hall, Liverpool," and accepted thus:—"Accept-

ed, E. M." The three defendants, with E. M. and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf:—*Held*, that the defendants were bound by the acceptance, though it did not shew on the face of it that E. M. intended to accept not individually, but for himself and four others. *Jenkins* v. *Morris*, 877

III. *Notice of Dishonour.*

(1). *By whom to be given.*

Assumpsit by Charles Williams, as indorsee of a bill against the indorser. The declaration averred that *one* Charles Williams drew the bill on J. D., that the defendant indorsed it to the plaintiff, and that the drawee did not pay it when due. Plea, that the defendant had not due notice of the non-payment. The plaintiff was proved to be the drawer, and to have given notice of the dishonour to the defendant:—*Held*, that, on these pleadings, the defendant could not object that the plaintiff was not competent to give notice of dishonour, on the ground that the Charles Williams suing as indorsee and the Charles Williams stated in the declaration to be the drawer were the same person. *Williams* v. *Clarke*, 834

(2). *By Post.*

If a notice of dishonour of a bill of exchange be *posted* by the holder in due time, he is not prejudiced if, through mistake or delay of the post-office, it be not *delivered* in due time. *Woodcock* v. *Houldsworth*, 124

(3). *Allegation of Excuse for want of.*

Assumpsit on a promissory note by indorsee against indorser. The declaration alleged that the note had been indorsed to the plaintiff by the payee, and averred, "that neither at the time when the note was made, nor afterwards, and before it became due, nor when it became due, and on presentment for payment, had the maker, or the payee, any effects of the defendant in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, or its indorsement by the payee to the defendant; and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note. Special demurrer:—*Held*, that as against an *indorser* the declaration was bad, for not stating a sufficient excuse of want of notice of dishonour; for it was consistent with its allegations, that the note might have been indorsed by the defendant for the accommodation of one of the prior parties to it, in which case the defendant would be entitled to notice of dishonour. *Carter* v. *Flower*, 743

IV. *Actions on.*

Plea of non assumpsit in.

Where the defendant pleads non assumpsit to the whole of a declaration, consisting of a count on a bill of exchange and money counts, the plaintiff cannot sign judgment generally.

And the Court will not allow him to amend the judgment, by confining it to the count on the bill, and entering a nolle prosequi on the other counts. *Eddison* v. *Pigram*, 137

BOND.

See PRINCIPAL AND SURETY, 2.

BROKER.

See RAILWAY SHARES.

Who is.

A person who hires or procures for

another persons to be employed by him in the laying out and surveying of a line of railway, is not a *broker* within the stats. 13 Edw. 1, s. 5, and 6 Ann. c. 16, s. 4, which prohibit persons from acting as brokers within the city of London, unless licensed by the Court of the Mayor and Aldermen. *Milford* v. *Hughes*, 174

BURIAL FEES.

Upon a special case stated as to the right of the plaintiff, as rector of the parish of St. Marylebone, and minister of the new church of that parish, to recover certain fees alleged to be due for the burial of certain paupers in the new burial-ground of the parish, it appeared, that, in 1733, the then minister or rector of the parish, and the parochial authorities, referred to a third person the settlement of the minister's fees, and a table of fees was accordingly prepared by the referee. From that time down to 1838, a fee of 1*s.* 6*d.* was paid by the parish officers to the minister or rector of the parish for the burial of a pauper in any of the cemeteries of the parish. By the stat. 51 Geo. 3, c. 151, (A. D. 1811), the vestrymen of St. Marylebone were empowered to purchase land for erecting a new church and new chapels, and making a new burial-ground. By sect. 35, Dr. H., the then rector, and his successors, were declared to be ministers of the new church, and the patron of the living was empowered to appoint successively ministers of the new church, who were to enjoy such oblations, mortuaries, glebes, tithes, profits, and other ecclesiastical dues, as the present minister ought to have. Power was also given to the patron to appoint a minister to officiate in burying the dead in the new burial-ground, but no person was appointed in pursuance thereof. By sect. 49, the vestrymen were empowered to settle the rates and fees for burial in the new burial-ground, and to alter and amend the same. By sect. 50, they were prohibited from reducing the burial fees below the amount then payable for burials in the parish. By sect. 71 they were empowered to borrow 150,000*l.* on the credit of the rates and burial fees, and to assign any portion of such rates or fees to the persons advancing the money. In pursuance of the act, the vestry, in 1835, settled a table of fees, of which an item was, "Paupers from the workhouse, 2*s.* 6*d.*;" and from that time the sum of 1*s.* 6*d.* has been paid to the rector, and 1*s.* to the clerk and sexton, on such burials. The burial service has not been performed by the rector or any of his curates, but by the reader of one of the new chapels:—*Held*, first, that, upon this statement, no fee was shewn to be due to the plaintiff, either by custom or by virtue of the act of Parliament; secondly, that, if such fee were due, it must be recovered in the Ecclesiastical Court. *Spry* v. *Gallop*, 716

CHARTERPARTY.

See DEMURRAGE.—PLEADING, II.

CHEQUE.

When Evidence of Payment.

The defendant having money of the plaintiff in his hands, drew on his banker, in favour of the plaintiff, a cheque, which was paid to the plaintiff at the bank:—*Held*, evidence of payment, without proof that the plaintiff had received the cheque from the defendant. *Mountford* v. *Harper*, 825

COGNOVIT.

Attestation of.

The following attestation of a cognovit was held to satisfy the 1 & 2

Vict. c. 110, s. 9:—"Duly executed by the above-named R. G., in the presence of me the undersigned S. B., attorney on behalf of the said R. G., expressly named by him and attending at his request; and I hereby declare that I subscribe my name as witness to the due execution hereof by the said R. G., and as his attorney, and that, previous to the execution thereof by the said R. G., I informed him of the nature and effect thereof." Signed, "S. B.," &c. *Phillips* v. *Gibbs*, 208

CONDITION PRECEDENT.

A local act, for paving and improving the town of Salford, appointed commissioners for putting it into execution, and authorised them to pave new streets, and provided that the expenses of such new pavements should be paid and reimbursed to the commissioners by the owners or occupiers of the land adjoining the streets, in manner therein mentioned; and empowered the commissioners to recover such expenses by action at law. A subsequent section, commencing, "Provided always, and be it enacted," directed, that, before the commissioners should cause the streets to be paved as aforesaid, they should in the first place give notice to the owner or occupier of every house, land, &c. adjoining the street, requiring him to pave the same as the commissioners should direct; and if any such owner or occupier should for six months neglect to pave pursuant to the notice, then it should be lawful for the commissioners, and they were thereby required, to cause the same to be done, and to recover the expenses from such owner or occupier as thereinbefore mentioned:—*Held*, that the giving of this notice was a condition precedent to the commissioners executing the paving themselves, and charging the expenses on the owner or occupier, and that it must be averred in the declaration, in an action brought under the act for the recovery of such expenses. *Salford, Mayor of &c.* v. *Ackers*, 85

COPYHOLD.

Steward's Fees.

U., a copyhold tenant of the manor of S., was owner of sixteen separate tenements, holden by sixteen separate copies of court-roll, and sixteen separate yearly quit rents. He was admitted to the above tenements at five different times, and by five different titles. An inclosure act passed directing commissioners to allot the waste lands in S. among the owners thereof, in proportion to their rights and interests in the same. The act also directed that the allotted lands should be held by the allottees under the same tenures, rents, customs, and services as the lands in respect of which they were allotted would have been in case the act had not been passed; and that, where the lands were held under different titles, or for different estates, the commissioners should distinguish the lands held for each of such estates and titles, and set out the allotments accordingly. The commissioners allotted to U., in respect of his sixteen copyhold tenements, five pieces of land, amounting in the whole to forty-nine acres, but did not distinguish in respect of which of the sixteen tenements, or of what particular estates, the five pieces were allotted. U. afterwards surrendered to the defendant the fifth allotment, and the defendant was duly admitted to the same. Before the inclosure act passed, when any person was admitted in severalty to a part of a copyhold tenement, the steward of the manor was entitled, upon such admission, to the same amount of fees as if such

person had been admitted to the whole of such tenement. In an action by the steward to recover sixteen fees in respect of the defendant's admission to the fifth allotment — *Held*, that such allotment must be considered as an allotment of a portion of each of the sixteen former tenements, and that, therefore, the steward was entitled to recover sixteen fees. *Evans* v. *Upsher*, 675

COSTS.

See ABATEMENT.
PRACTICE, 6.

(1). *On Plea of Payment into Court.*

Debt for goods sold. Pleas, first, as to all but 15*s.*, parcel of the monies in the declaration mentioned, never indebted; secondly, as to the said sum of 15*s.*, parcel &c., payment into court of 15*s.* Replication, similiter to first plea; as to last plea, that plaintiff accepts the 15*s.* in full satisfaction and discharge of the cause of action in the introductory part of that plea mentioned, with prayer of judgment for his costs sustained in that behalf. At the trial, the jury found that the defendants never had been indebted to the plaintiff in more than the 15*s.*:—*Held*, that the plaintiff was entitled to costs on the replication to the last plea. *Harrison* v. *Watt*, 316

(2). *Of the Day—Notice of Taxation.*

Where a party obtains an order for the postponement of the trial of a cause on payment of costs of the day, he must give notice of taxation of such costs, otherwise the other party may go on to trial. *Waller* v. *Joy*, 60

(3). *Of abortive Special Case.*

Where, on the moving of a rule for a new trial, the parties agree to state a special case, (nothing being said about the costs), but no case is ultimately stated, the costs of such abortive special case are not costs in the cause. *Foley* v. *Botfield*, 65

(4). *Of Surveys.*

The expenses of surveying and taking levels, in order to ascertain whether a weir had been improperly raised, to the prejudice of plaintiff's water-mill, will not be allowed him on taxation. *Ormerod* v. *Thompson*, 860

COVENANT.

See INTEREST, 1.

(1). *Where divisible—Liquidated Damages or Penalty.*

By deed, reciting that A. and B. carried on business as perfumers in partnership, and that it had been agreed between them that B., in consideration of 2100*l.*, should assign to A. his moiety of the goodwill, stock in trade, &c. of the co-partnership, B. in consideration thereof, covenanted that he would not during his life carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same respectively; and, for the observance of that covenant, he bound himself to A., his executors, &c., in the sum of 5000*l.*, by way of liquidated damages, and not of penalty:—*Held*, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that this covenant was divisible, and was good so far as it related to the cities of London and Westminster, though void as to the 600 miles; that a breach, that B. carried on the trade in the city of London, was good, and that A. was entitled to recover, in respect of such breach, the whole sum of 5000*l.* *Price* v. *Green*, 346

(2). *For further Assurance of Chattels—Breach of, by Executor of Assignor.*

Covenant.—W., by voluntary conveyance, assigned to plaintiff, his executors, &c., his furniture, effects, &c., in trust to the use of W., the settlor, for his life, and at his death, in equal moieties, to the use of two nieces of W., named. Covenant by W., for himself and his heirs and executors, to do all further reasonable acts and things for further and better assigning and transferring the said furniture, &c., to plaintiff, on the same trusts as by plaintiff or his counsel should be reasonably advised. W. was in possession of the furniture, &c., till his death. On that event, defendant, his executor, became possessed, and sold the whole. Plaintiff sued the defendant, as executor of W., on the above covenant for further assurance, averring in his declaration that it was at no time necessary to sell any of W.'s chattels to pay any debt of W., and that there were no creditors of his who could impeach the validity of the indenture; and assigning, by way of breaches, first, that defendant refused to deliver possession of the furniture to plaintiff; and, secondly, that defendant converted and sold the same, not alleging that he sold it in market overt:—*Held*, that the plaintiff was entitled to recover, at least on the last breach, the value of the furniture possessed by W. from the time of his executing the deed to his death, and afterwards sold by the defendant as his executor, though trover might have been sustained for the same cause of action. *Ward* v. *Audland*, 862

DAMAGES.

Measure of, in Assumpsit for Breach of Agreement.

A. having recovered a judgment for 280*l.* against B., agreed with C. to forbear to sue out execution on the judgment until a certain day, in consideration of which C. agreed that he would, on or before that day, erect a substantial house, and cause a lease of it to be granted to A.; such lease, when granted, to be in satisfaction of the judgment. In an action for the breach of this agreement — *Held*, that the value of the house was the measure of damages, and that such value was properly estimated at the amount of the judgment-debt. *Strutt* v. *Farlar*, 249

DEBT.

See PLEADING, III, 3.

DEBTOR AND CREDITOR.

Composition between—Pleading.

In assumpsit, the defendant pleaded, that, after the causes of action accrued, the defendant and M., who was jointly liable with him to the plaintiff, became unable to pay their creditors in full; and thereupon it was agreed by the defendant and M., the plaintiff, and the other creditors, that a composition of 4*s.* 6*d.* in the pound should be paid upon their debts, and that, upon receiving that sum, the plaintiff and the other creditors should execute to defendant and M. a general release; that a deed of release was prepared for execution, and that the creditors, except the plaintiff, received the composition, and executed the release; that the defendant has always been ready to pay the plaintiff the composition of 4*s.* 6*d.* in the pound upon his executing the release, of which plaintiff had notice, and was requested by defendant to accept the composition and execute the release:—*Held* bad, for not shewing that the defendant and M. offered to pay the plaintiff the com-

position money, or tendered the release to him for execution. *Rosling* v. *Muggridge*, 181

DEMURRAGE.

See PLEADING, II.

Form of action for.

Where a charterparty stipulates for seventy-five running days, and twenty days on demurrage, if the ship is detained for extra days, the remedy is not by an indebitatus count for demurrage, but by action on the charterparty itself. *Cropton* v. *Pickernell*, 829

DETINUE.

Pleading—Bailment not traversable.

Detinue.—Declaration alleged, that plaintiff delivered certain paper writings, purporting to be scrip certificates for shares, to defendant, to be re-delivered, on request, after payment to him of a certain sum, averring that that sum was paid to defendant. Breach, that defendant hath not delivered the paper writings, though requested, but "detains" the same. Plea, that they were deposited with defendant as a pledge and security for 210*l.* advanced by him to plaintiff, and that, on payment of that sum, defendant tendered and offered to deliver up and return them to plaintiff, who then refused to receive them:—*Held*, on demurrer, that this plea was bad, for denying the detention argumentatively, and for amounting to non detinet. The detention complained of was an adverse detention, because the word "detain" in a declaration in detinue means that defendant withholds the goods, and prevents plaintiff from having possession of them.

The bailment stated in the declaration in detinue, whether it be general or special, is surplusage, and not traversable, the gist of the action being the detainer of plaintiff's goods. *Clements* v. *Flight*, 42

DEVISE.

(1). *When void for Remoteness.*

A testator devised lands to P. M., his brother, for life; remainder to the use of the first son of the body of P. M. for life; remainder to the use of the first son of the said first son, and the heirs male of his body; and in default of such issue, to the use of all and every other the son and sons of P. M., severally and successively, for the like interests and limitations as he had before directed respecting the first son of P. M., and his issue of the body; and, in default of issue of the body of P. M., or in case of his not leaving any at his decease, then over. P. M. never had any issue:—*Held*, that all the limitations after that to the use of the first son of the body of P. M. were void for remoteness, and that the sons of P. M., if he had any, would not, by the application of the doctrine of cy-pres, have taken an estate tail, inasmuch as such a construction of the will would be to make the estate devolve in a line of succession different from that which the testator had expressly designated. *Monypenny* v. *Dering*, 418

(2). "*Next Heir.*"

In 1786, a testatrix devised her real estate to her brother-in-law T. K. and sister A. K. his wife, for their lives; and from and after their deceases, to her nephew J. G. K., son of the said T. and A. K., in fee; but in case the said J. G. K. should not survive the said T. and A. K., and should die without an heir lawfully begotten, then and in such case, the testatrix devised the same *to the next heir* of the said T. and A. K., *their* heirs and assigns for ever. The said J. G. K. mentioned in the will died

in his parents' lifetime, an infant. After his death, another son of T. and A. K. was born, who was called by the same names. A. K. died in 1795. The second J. G. K. married and had issue a son, J. K., and died in 1823. T. K. died in 1842:—*Held*, that the "next heir," in the will, was to be construed to mean the person who should fill the character of *true heir* of T. and A. K.; that, therefore, the executory devise over took effect only on the death of T. K., the surviving devisee for life, and the estate then vested in J. K., who then filled the character of heir of T. and A. K. *Doe* d. *Knight* v. *Chaffey*, 656

(3). *Nomen collectivum, what is.*

A testator, after bequeathing his personal estate, devised as follows:—"I also give all my real estate, in the counties of Pembroke and Carmarthen, to my eldest son John, as aforesaid, *for his life, and to his eldest legitimate son after his death;* and in default of such issue, I give it in like manner to my son Richard; and in case that he has no legitimate issue male, I then give it in like manner to the offspring about to be born from my dearest wife Bessy; and in default of such issue, to my own right heirs for ever:"—*Held*, that John took an estate in tail male, the words "eldest legitimate son" being nomen collectivum. *Lewis* v. *Puxley*, 733

(4). *Assent of Devisee to.*

At the reading of a testator's will, soon after his death, the devisee in trust said "he ought to have had 5*l.* for being trust:"—*Held*, that these words were so equivocal and ambiguous, that they should not have been left to the jury as proving his assent, as a trustee, to the devise.

Quære, whether an unambiguous assent to a devise, expressed by words or matter in pais, without deed, is sufficient?

Quære, whether a devisee in trust can disclaim by deed after previous assent to the devise in words? *Doe* d. *Chidgey* v. *Hariss*, 517

DISTRESS.

See PLEADING, VI, 2.

EASEMENT.

Devise of, under Term "Appurtenances"—Extinguishment of, by Unity of Possession.

A., being a termor of land, built two houses on it. The whole was then released to him in fee, "with all ways, easements, advantages, and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied, or enjoyed." By his will, he devised one house, and the appurtenances thereunto belonging, to B., and the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B. was by a set-out carriage drive or sweep, entering from a high road, passing immediately in front of the house afterwards devised to C. to B.'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house opening only into the high road, and a back entrance into the same. After A.'s death, C. made a fence across so much of the carriage drive as passed immediately in front of his house, and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass, claiming the way as appurtenant to his house and garden:—*Held*, first, that the way, as used in A.'s time during the unity of owner-

ship in him, immediately in front of C.'s house, did not pass to B. with the house devised to him, under the word "appurtenances" in A.'s will; and, secondly, comme semble, that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had.

Semble, nothing of absolute necessity to a building, e. g. a gutter in alieno solo, to carry off water, &c., is extinguished by unity of ownership. *Pheysey* v. *Vicary*, 484

EJECTMENT.

Service on Railway Company.

Service of declaration, in ejectment against a railway company, upon the secretary of the company, is good, by stat. 8 & 9 Vict. c. 16, s. 135. *Doe* d. *Bayes* v. *Roe*, 98

EVIDENCE.

(1). *Undertaking to give material Evidence.*

A letter, written and posted in county A., and addressed to and received by the plaintiff in county B., whereby the defendant admits a part of the debt claimed in the action, is evidence sufficient to satisfy the plaintiff's undertaking to give material evidence in county A. *Hall* v. *Story*, 63

(2). *Post-mark.*

Semble, if the post-mark of a letter be given in evidence, it ought to be proved, either by persons from the post-office, or by persons who are in the habit of receiving letters from that post-office. *Woodcock* v. *Houldsworth*, 124

(3). *Privileged Communication.*

Where an act is done in pursuance of a bargain between two parties, and in presence of the attornies for each of them, the communication by one party to his attorney relating to that act is not privileged, so as to prevent the attorney from giving evidence of it. *Weeks* v. *Argent*, 817

(4). *Award and other Documents under Inclosure Act—Declaration of Party in possession—New Trial for Rejection of Evidence.*

An award, allotting land under an inclosure act, coupled with the terms of the original claim to such allotment, is admissible in evidence to shew that the claimant's interest in the lands in respect of the possession of which he claimed the allotment was less than the fee.

The determination of a copyhold interest may be shewn without producing the copy of court-roll. Thus, a declaration by the party in possession, that his interest was less than a fee, e. g. for his own life only, would be primary evidence that it ceased to exist at his death. *Secus*, where he declared that he held "for life interest," that statement being consistent with one or more life interests coming into existence at his death.

By an inclosure act, the expenses attending the inclosure were to be raised by sale of part of the commonable lands, the balance, if any, of the proceeds to be repaid to the landowners. Accordingly, sales were made, and the surplus proceeds divided among the landowners according to a "return rate," divided into two proportions, one calculated according to the "possessioners'" interest for life or years, the other the reversioners' proportion, calculated according to the time likely to elapse before their interest accrued into possession. A landowner in possession, aged seventy, received a sum calculated on the as-

sumption that his estate was held for his life; but it did not appear that the party had any knowledge of the paper containing the rate, or of the data by which the sum he had received was fixed:—*Held*, that the return rate was not evidence to cut down his interest to less than a fee.

By an inclosure act, claims to allotments were to be made in writing, and sent to the commissioners. The claims made were entered by their clerk in a book, though not required by the act to be so kept. The claims allowed by the commissioners were marked in the book "allowed," and attested by their initials affixed thereto. The entries were made in the course of business, and at the time they purported to bear date. *Semble*, they were admissible in evidence, on proof of the clerk's death, and of a negative search for the original claims in the proper repository.

A declaration by a possessor of land, that he held "for life interest," does not necessarily admit that the right of possession would, immediately at his death, accrue to the reversioner, for one or more other life interests might exist consistently with the words used. The expression being merely ambiguous, would, if relied on for plaintiffs in ejectment, so far justify the judge in nonsuiting, that no new trial would be granted; for, the burden of affirmative proof of title being on them, they adduced no evidence having a preponderance either way, so as to make it necessary to leave it to the jury.

Where evidence tending to establish a point already supported by more direct proof is improperly rejected, the Court will not grant a new trial on that ground, if they see that the case would not have been advanced further by admitting the particular piece of evidence. *Doe* d. *Welsh* v. *Langfield*, 497

EXCISE ACTS.

(1). *Distiller, who is.*

A person who distils spirit for the purpose of making, by the addition of nitric acid, *sweet spirits of nitre* for sale, is a distiller of spirits within the meaning of the 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise license, and liable to the penalties imposed by s. 39 of that act on persons having any private or concealed still, &c. for making or distilling low wines or spirits. *Att.-Gen.* v. *Bailey*, 74

(2). *Appeal under—Special Case for Exchequer.*

By 7 & 8 Geo. 4, c. 53, s. 82, the officer of excise proceeding by information for any offence against that act, as well as any party aggrieved by the decision of justices adjudging on such an information, may appeal to the quarter sessions, on giving the notices of appeal pointed out by the act. By s. 84, the quarter sessions are to rehear upon oath, and to re-examine the same witnesses, and to reconsider the same evidence and the merits of the case, wherever the original judgment appealed against shall have been given, and shall not examine any evidence, or any witness or witnesses, other than or different from the evidence of the witness or witnesses which and who shall have been examined before the justices at the hearing of the information on which the original judgment shall have been given, and may reverse or confirm in whole or in part the judgment appealed against, or give such new or different judgment as in their discretion they think fit.

An information on this act contained four counts. The justices convicted on the fourth, and acquitted on the others. The defendant gave notice of appeal from the judgment to

the quarter sessions, but the officer prosecuting on the part of the Crown gave no notice of appeal against the judgment of acquittal on the first three counts:—*Held*, that the defendant's notice of appeal was limited to the judgment of the convicting justices on the fourth count, and that if, on the hearing, the Court of appeal was of opinion that that count was not sustained by the evidence adduced, but that the second was, the judgment must be altogether for the defendant.

It appeared on affidavit, that the Court of appeal, constituted by 7 & 8 Geo. 4, c. 53, s. 82, suspended its judgment, and stated a special case for the opinion of the Court of Exchequer, under s. 84:—*Held*, that no certiorari was requisite to enable that Court to give its direction on the special case.

The original distinction of grand and petty larceny made it necessary in indictments for larceny to allege the value of the chattel stolen, in order to allot the punishment; but whether, in an information for offering a country bank-note to an excise officer, by way of bribe, the value of it need be stated, *quære*. *Reg.* v. *Gamble*, 384

EXECUTORS AND ADMINISTRATORS.

See ABATEMENT.
COVENANT, 2.
SCIRE FACIAS.

EXTORTION.

See SHERIFF.

FINE.

Estate necessary for Conusor — Welch Fine—Satisfied Terms Act.

In 1839 A. died seised in fee of lands, of which his eldest son, B., was his tenant. On his death, B., supposing him to have died intestate, entered on the lands, claiming them as heir-at-law, and in 1830 mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time, an outstanding term of 500 years was by his direction assigned to a trustee for the mortgagee. In 1835 B. sold the estate to the defendant, who paid off the mortgage; the legal estate in fee and the equity in redemption were conveyed to the defendant, and the term was assigned to a trustee for him, to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee to whom the term was assigned in 1835:—*Held*, first, that B. had a sufficient estate to make him a good conusor of the fine; secondly, that, by the operation of the 8 & 9 Vict. c. 112, the term had absolutely determined, and the plaintiff could not recover upon the demise laid in the name of the trustee.

To prove the levying of a fine with proclamations in a court of great session in Wales, the chirograph was produced, having one proclamation indorsed, and the plea-roll of the same session at which the chirograph stated the fine to have been levied, containing an entry of a licentia concordandi between the same parties and respecting the same premises as those mentioned in the chirograph:—*Held* sufficient, by virtue of the stat. 5 Vict. c. 32, s. 2. *Doe* d. *Cadwalader* v. *Price*, 603

FOREST.

See INJUNCTION.

FRAUDS (STATUTE OF).

(1). *Delivery and Acceptance.*

Goods were shipped by the plain-

tiff from abroad to this country, on the verbal order of the defendant, at a price exceeding 10*l*. They were sent to a shipping agent of the plaintiff's in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery-warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges. The agent indorsed and delivered this warrant to the defendant, who kept it for several months, and, notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods; and that they would remain for the present in bond: —*Held*, that there was no such delivery to and acceptance by the defendant of the goods, as to satisfy the 17th section of the Statute of Frauds. *Farina* v. *Home*, 119

(2). *Earnest.*

Debt for goods sold and delivered. Pleas, never indebted and set-off. Plaintiff owed defendant a debt, and while it remained due sold him goods by sample to a larger amount, and exceeding 10*l*., without note or memorandum in writing of the bargain for sale. Part of that bargain was, that the debt due from plaintiff was to go in part payment by defendant to him, but no actual payment of money was made by either, nor was any receipt given by defendant for plaintiff's debt to him. The goods were supplied to defendant, who returned them as inferior to sample, and the jury found that he had never accepted them. Verdict for defendant:—*Held*, on motion for a new trial, that nothing had been given in earnest to bind the bargain, or in part of payment, within 29 Car. 2, c. 3, s. 17, so as to make the contract binding on the buyer. *Walker* v. *Nussey*, 302

GUARANTEE.

See PRINCIPAL AND SURETY.

Construction of—Variance.

Declaration in assumpsit on a guarantee stated, that the defendant promised the plaintiffs to guarantee to them the due acceptance and payment of two bills of exchange drawn by K., being the amount of an invoice of the plaintiffs of goods shipped by them; and that, as the defendant had not then heard from K. if the invoice had been found correct, the defendant was to have "*the* reserve customary under such circumstances." The terms of the guarantee were, that the defendants guaranteed the due acceptance and payment of the bills, &c., and it proceeded thus:—"As we have not heard from Mr. K. if your invoice has been found correct, we claim *this reserve* as customary under such circumstances." It appeared that the invoice was in fact correct:—*Held*, that there was no variance.

A party who guarantees the due payment of a bill of exchange by the acceptor, is liable for *interest* upon it, if it be not paid when due. *Ackermann* v. *Ehrensperger*, 99

HERALD.

See ARREST, 2.

HERIOT.

See PLEADING, IV, 1.

HUSBAND AND WIFE.

See BANKRUPTCY.
PLEADING, III, 1.

INCLOSURE ACT.

See EVIDENCE, 4.

INFANT.

Lease by.

H. T. being seised in fee of certain premises, devised the same to his son W. T. for life, with remainder to the issue of W. T. as tenants in common in fee. In April, 1845, W. T. died, having by will appointed executors, who managed the estate for the infant children of W. T., and, in the years 1845 and 1846, received rent from the defendant, who had been in possession prior to the death of W. T.: —*Held*, that the acts of the executors did not bind the infant children, and that the latter might maintain ejectment against the defendant without any previous notice to quit or demand of possession. *Doe* d. *Thomas* v. *Roberts*, 778

INFERIOR COURT.

(1). *Justification under Process of.*

In trover, the defendant pleaded, that the supposed grievance was committed after the passing of the 7 Vict. c. 19, and within the jurisdiction of the inferior court thereinafter mentioned; and that, before and at the time of the grievance, the defendant had been duly appointed to act as a bailiff in the execution of the process of the Court of the Tolzey of Bristol, which then, and at the time of the passing of the said act of Parliament, had, by charter, jurisdiction for the recovery of debts and damages in personal actions arising within the city and county of Bristol; and the defendant then became and was, and thenceforth until and at &c. was a bailiff of the said court; and that no notice of action was given to him pursuant to the said act:—*Held*, on demurrer, first, that the plea brought the defendant within the protection of the 8th section of the act; secondly, that the jurisdiction of the inferior court was sufficiently shewn; thirdly, that the defendant's duty as bailiff was sufficiently set forth. *Braham* v. *Watkins*, 77

(2). *Liability of Plaintiff in, for Trespass.*

Where it is the regular course of proceeding of an inferior court, on a verdict being found therein, for the judges of the court to issue execution for the debt in case of non-payment, and levy the amount, the fact of the plaintiff's bringing his plaint in the inferior court, and not countermanding the execution, renders him liable in trespass for the seizure, unless he justify under the process of the inferior court. *Coomer* v. *Latham*, 713

INJUNCTION.

For cutting Trees in Royal Forest.

An information, filed by the Attorney-General, suggested that an information had been previously filed against the defendant for an incroachment by him on the Royal Forest of Waltham, by enclosing land therein (about twelve acres) with a ditch and fence, and that, pending the judgment of the Court on a demurrer in that cause, the defendant had very lately commenced cutting down and clearing away all the holly trees and underwood on the land so inclosed by him, such trees, &c. being part of the vert and covert of the forest. The present information prayed that the defendant might be restrained from cutting any more trees or underwood growing in the forest. The answer stated that the defendant was seised in fee of the locus in quo by having bought it three years ago, and that it was not part of or within the forest, and that he cut the holly trees and underwood at the proper season

and in the course of the proper management of the estate, as it had been cut for the last twenty years:—*Held*, that the vert of a forest is a necessary part of it; still as no irreparable injury to the vert was shewn in this case, the act of the defendant, assuming the locus in quo to be within the forest, was a trespass in the nature of waste, which might be compensated in damages, and, therefore, that no injunction could be granted. *Att.-Gen.* v. *Hallett*, 569

INSURANCE (MARINE).

Deviation.

Insurance on ship, at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope. The ship sailed from Liverpool direct to a port in China, having on board a cargo for that port and Manilla; from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla, the captain took on board, on freight, 230 chests of opium for Tongkoo, another port in China, (not being thereby a tenth part laden), and sailed for Tongkoo, there to seek a freight for the United Kingdom, and on her voyage thither was lost by perils of the seas. Tongkoo is quite out of the direct course from Manilla to the United Kingdom:—*Held*, that the words "from thence," in the policy, meant not "from Manilla" only, but "from ports or places in China and Manilla, all or any;" and that the sailing from Manilla to Tongkoo, for the purpose of seeking a homeward cargo, was not a deviation. *Ashley* v. *Pratt*, 471

INTEREST.

(1). *When recoverable in Covenant.*

The Great Western Railway Company granted to the plaintiffs debenture bonds in the following form:—"By virtue of an act passed &c., we, the Great Western Railway Company, in consideration of 1000*l.* to us paid by T. P. and W. G., do assign to the said T. P. and W. G. the said undertaking, and all future calls, and all the estate, right, title, and interest of the said company in and to the same, to hold unto the said T. P. and W. G., until the said sum of 1000*l.*, together with all interest for the same after the rate of 5*l.* per cent., payable as hereinafter mentioned, shall be fully paid and satisfied; and it is hereby stipulated that the said principal sum of 1000*l.* shall be repayable and repaid on the 15th of January, 1844, and that in the meantime the said company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest-warrants the several sums mentioned in such warrants respectively, at the times specified therein." In January, 1844, the previous interest having been duly paid, the last of the coupons or interest-warrants was presented, and the interest paid to the plaintiffs; but the company did not then pay the principal, or give notice to the plaintiffs that they were ready to pay it:—*Held*, that the plaintiffs were entitled, in an action of covenant, to recover interest from the 15th of January, 1844, to the time of the payment of the principal. *Price* v. *Great Western Railway Co.*, 244

(2). *On Judgment Debt, from what Time it runs.*

Interest runs on a judgment debt, under the stat. 1 & 2 Vict. c. 110, s. 17, from the time of the entry of the incipitur, and not merely from the

final completion of the judgment, after the taxation of costs. *Newton* v. *Grand Junction Railway Co.*, 139

I O U.

See ACCOUNT STATED.

JUDGMENT.

See INTEREST, 2.

LANDLORD AND TENANT.

See PLEADING, VI, 2.
WASTE.

(1). *Contract to repair, Construction of.*

Defendant, on becoming tenant to plaintiff of a farm and out-buildings, agreed to *keep* the same, and at the expiration of the tenancy to deliver up the same, *in good repair*, order, and condition. Breach, that he did not keep and deliver up the farm, &c., in good repair, &c.:—*Held*, that, on this contract to *keep* the premises in good repair, the tenant was bound to *put* them in that condition, and that he was not justified in keeping them in bad repair because he found them in that condition; but the extent of that repair was to be measured by their age and class. *Payne* v. *Haine*, 541

LEASE.

See INFANT.

(1). *Lease or Agreement—Stamp.*

By 7 & 8 Vict. c. 76, s. 4, (in force from and after the 31st of December, 1844, and repealed by 8 & 9 Vict. c. 106, from the 1st of October, 1845), it was enacted, that no lease in writing of any freehold, copyhold, or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease. By a document, dated the 3rd of July, 1845, and purporting to be a memorandum of agreement, (made while that section was in force), M. agreed to let and B. to take certain rooms in a house from the 7th day of that month, for the monthly rent of 36*s.*, to be paid every four weeks:—*Held*, that it was only an agreement to execute a lease, and was well admitted in evidence as such agreement without a stamp, being of no certain value above 1*l.* 16*s.*

Quære, whether, since the repeal of 7 & 8 Vict. c. 76, s. 4, by 8 & 9 Vict. c. 106, such a memorandum would require a stamp of 1*l.* 15*s.*, as a lease, under 55 Geo. 3, c. 184, sched., part 1, tit. Lease. *Burton* v. *Reevell*, 307

(2). *Construction of Contract for Assignment of.*

A., the lessee for years of premises, under a lease containing a stipulation that all improvements made by him were to belong to the lessor at the end of the lease, except any green-house he might erect, bargained with B. to assign the lease to him, and to sell him a green-house which he had erected, and which was affixed to the freehold, together with the furniture, crops of fruit, and plants therein, for a certain sum. B. was let into possession of the green-house and its contents, but, owing to a difficulty in obtaining the lessor's consent, no assignment of the lease was made to him:—*Held*, that the contract was an entire one for the assignment of the lease and the sale of the green-house, and that until the lease was assigned B. could not be sued by A. for the price of the green-house. *Sleddon* v. *Cruikshank*, 71

LEGACY.

Action for, when maintainable.

The defendant, as the agent of an executor, wrote to a legatee informing

him of his legacy and its amount, and stating that he would remit it in any way the legatee might suggest. He transacted the business necessary for the transfer of the legacy, and remitted to the legatee the amount of the legacy minus a sum deducted for expenses:—*Held*, that the defendant was not liable to the legatee, in an action for money had and received, for the sum so deducted. *Barlow* v. *Browne*, 126

LIBEL.

(1). *Action for, after Motion for Criminal Information.*

Where a rule nisi obtained for a criminal information for a libel, in the Queen's Bench, is discharged on shewing cause, the applicant may bring an action in another court for the publication of the same libel. *Wakeley* v. *Cooke*, 822

(2). *Pleadings in.*

1. In case for libel, the declaration alleged the libel to be, that plaintiff sought admission to a club held in the town of P., and gave an entertainment a few days before he was to be elected as he thought; that three days after he stood the ballot and was black-balled; that next morning he *bolted*, and some of the poor tradesmen had to lament the fashionable character of his entertainment. Plea, that plaintiff did suddenly leave and quit the town of P. without paying every one and all of the debts contracted by him with *divers* persons in the said town, and without notice to them, and with intent to defraud and delay *some* of the last-mentioned persons, whereby the said persons remained unpaid and defrauded:—*Held* bad on special demurrer, for not stating the names of the persons alleged to have been defrauded.

The declaration also averred, that the libel used the words "black-legs" and "black-sheep" to denote persons guilty of fraud, and that divers persons had formed a club called "The Royal Western Yacht Club;" that defendant, intending to cause it to be believed that plaintiff was a confederate of persons guilty of fraudulent play at cards, and of being black-legs and black-sheep in the sense aforesaid, in a certain newspaper, &c., published *of and concerning the plaintiff* the following libel: "Royal Western Yacht Club.—Expulsion of two black-legs" (meaning an expulsion from the club of two persons being black-legs in the sense in which that word was used as aforesaid). The declaration then alleged, that suspicion had attached to two members (meaning the aforesaid two persons) of the club, owing to two gentlemen having been plucked at cards, at the residence of one of the two suspected members, in a manner seeming to indicate foul play; that inquiry took place, which resulted in expelling the two suspected persons; that a person, known to be a confederate of the expelled parties, sought admission into the club. His name was O'B. (meaning thereby the plaintiff):—*Held*, on motion in arrest of judgment, that, as the matter shewn to be libellous by prefatory averment was so coupled with inuendoes in the declaration as to shew it to have been published by the defendant of and concerning the plaintiff, the declaration need not aver it to be also published of and concerning the Royal Western Yacht Club, or any other part of the prefatory averment. *O'Brien* v. *Clement*, 159

2. A libellous paragraph published of the plaintiff in a newspaper stated (in substance) that he was a confederate of black-legs; that he had sought admission into a Yacht Club; that he gave an entertainment in the expectation of being elected, but was black-balled, and the next morning *bolted*,

and some of the tradesmen of the town had to lament the fashionable character of his entertainment. A plea of justification, after alleging facts to shew that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and of his being black-balled, as mentioned in the libel, &c., stated that on the following morning "he *quitted* the town and neighbourhood, leaving divers of the tradesmen, to whom he owed money, unpaid," (naming them): —*Held* bad, inasmuch as such *quitting* might be innocent, and without any intention to defraud. *O'Brien* v. *Bryant*, 168

LIMITATION ACT.

(1). *Construction of.*

Replevin for distraining a cart on 13th May, 1845. Avowry, (under 11 Geo. 2, c. 19, s. 22), that the locus in quo was parcel of a tenement called H., holden of the manor of S. M., by fealty and rent of 9*s*. yearly, to be paid at Old Michaelmas in every year, of which manor defendant, at the time when &c., was the owner; and that, because defendant occupied the locus in quo at the time when &c., and because 2*l*. 14*s*. of the rent aforesaid for six years, ending at Old Michaelmas, 1844, was in arrear, defendant well avows the taking the said cart, &c. Pleas in bar—first, that the locus in quo was not parcel of the manor of S. M.; second, that it was not holden of that manor; third, that defendant was not owner and possessed of that manor; fourth, that no rent was in arrear. Issues thereon. H. farm was holden of the manor of S. M., at an ancient freehold rent of 9*s*. per annum, payable at Michaelmas, yearly. All arrears to Michaelmas, 1824, were paid in January, 1825. No other payment took place, but, after repeated applications for the rent in several years before Michaelmas, 1844, the lord distrained in May, 1845, for six years' rent due at Michaelmas, 1844:—*Held*, first, that, by the operation of 2 & 3 Will. 4, c. 27, sections 2, 3, and 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; and, secondly, that the bar thus interposed by that statute of limitations need not be specially pleaded, and might be given in evidence on the plea in bar of non tenuit.

In replevin, the judge's opinion at the trial was in favour of the defendant, so that he had no occasion to tender a bill of exceptions; but leave was given to move to enter a verdict for the plaintiff. The Court afterwards entered a verdict for the plaintiff. The effect was to extinguish the rent, the subject-matter of the avowry, without leaving any means of reviewing the judgment. The Court inclined to grant a new trial, but recommended a special verdict, in order to carry the case at once into a court of error, which was afterwards consented to, on terms. *Owen* v. *De Beauvoir*, 547

(2). *Pleadings on.*

In trespass qu. cl. freg., the defendant pleaded specially, deducing title to the locus in quo, under an inclosure act, in J. S., and alleging that J. S. thereupon became and continued possessed thereof until just before the time when &c., and the defendant then justified the trespasses as the servant of J. S., and by his command. The plaintiff replied, that the defendant entered and committed the trespasses after the passing of the Limitation Act, 3 & 4 Will. 4, c. 27; that the entry was made to recover the close in which &c.; and that the right to make such entry did not first accrue

to J. S., or to the defendant, or any person through whom J. S. or the defendant claimed, within twenty years next before such entry:—*Held* good, on special demurrer, and that it was not necessary to set forth the particular mode in which the estate of J. S., or the party through whom he claimed, had determined. *Jones* v. *Jones*, 699

(3). *Entry of Reversioner, when barred —Satisfied Terms Act.*

In 1784, premises were leased to H. J. for three lives. H. J. by his will devised all his estate and interest in the premises to his wife, A. J., her heirs and assigns. A. J. in 1793 conveyed the estate so devised to her to her son, R. J., and the heirs of his body, with a proviso that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A. J., her heirs and assigns. In 1811, R. J. purchased the reversion in fee in the premises, expectant on the lease for lives, which was duly conveyed to him; and at the same time an old satisfied term of 5000 years affecting the premises was assigned to a trustee for him, to attend the inheritance. R. J. died in 1812, without issue, leaving his nephew, L. J., his heir-at-law, and the heir-at-law of A. J. The lease for lives determined in 1835. For upwards of twenty years from the death of R. J. the premises were held adversely to L. J.:—*Held*, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the lease for lives in 1835. *Held*, also, that since the stat. 8 & 9 Vict. c. 112, the outstanding term would have been no defence to an ejectment by L. J., or any person claiming under him.

That branch of the 3rd section of the Limitation Act, 3 & 4 Will. 4, c. 27, which relates to estates in reversion, expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate. *Doe* d. *Hall* v. *Moulsdale*, 689

LIMITATIONS (STATUTE OF).

See BANKER.
PROCESS, 3.

Acknowledgment.

An admission by a bankrupt in his balance-sheet will not take a debt out of the Statute of Limitations as against his assignees.

An admission in an unsigned letter, written and sent, by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, will not take a debt of the bankrupt out of the Statute of Limitations. *Pott* v. *Clegg*, 321

LIQUIDATED DAMAGES.

See COVENANT, 1.

LONDON COAL ACT.

Stat. 1 & 2 Will. 4, c. lxxvi, s. 54, directs carmen of waggons, &c., in which coals are carried in sacks for delivery to purchasers in London, &c., to weigh, if required, each sack "with the coals therein, and afterwards to weigh in like manner each sack without any coals therein:"—*Held*, that to weigh each sack of coals in one scale against weights in the other scale equal to the proper weight of a sack of coals, together with an empty sack, is not a legal weighing within the act.

The same act (s. 47) required a seller's ticket to be delivered to the purchaser of coals, imposing a penalty of not exceeding 20*l*. on neglect, and (s. 77) enacted, that all penalties not exceeding 25*l*. should be levied and recovered before any justice or justices

of the peace. Stat. 1 & 2 Vict. c. ci, repealed so much of the act of 1 & 2 Will. 4 as related to the delivery of a seller's ticket, and proceeded by a new enactment (s. 3) to require a certain form of a seller's ticket to be delivered, under a penalty not exceeding 20*l.*, but did not subjoin any provision for recovering the penalty by any individual:—*Held*, that no action could be maintained for this penalty by the buyer of coals, where no seller's ticket was delivered. *Meredith* v. *Holman*, 798

MALICIOUS ARREST.

Action for—Declaration.

The only foundation of an action for a malicious arrest, under the 1 & 2 Vict. c. 110, is that the plaintiff has obtained the judge's order for the capias by *falsehood* or fraud. The declaration must therefore shew that.

But, *after verdict*, a declaration was held sufficient, which alleged that the defendants, not having any reasonable or probable cause to believe that the plaintiff was about to quit England, *falsely* and maliciously, and without any reasonable or probable cause, caused and *procured* a judge to make an order for a capias against the plaintiff, and falsely &c., by colour of the said order, caused a capias to be sued out thereon, and the plaintiff to be arrested under it. *Daniels* v. *Fielding*, 200

MINING COMPANY.

Liability of, on Bills accepted by resident Director.

By the deed of association of a mining company, it was provided, that the affairs of the company should be managed by a committee of seven shareholders, called managing directors; and they were empowered, at their meetings, to vote by proxy; and B. was appointed the resident director or manager, to superintend the mine and the local concerns thereof, hire workmen, provide machinery, &c., but subject to the instructions he might from time to time receive from the managing directors, to whom he was to transmit monthly accounts of the ore raised, wages paid, &c., and a full statement of all debts and liabilities due from the company; with a proviso that he should not expend or engage the credit of the company for any sum exceeding 50*l.* in any one month, without the express authority in writing of three of the managing directors:—*Held*, that this deed did not authorise B. to draw or accept bills of exchange in the name of the company, even for the necessary purposes of the mine, without the express authority of the managing directors. *Held*, also, that a managing director, who was represented at a meeting of directors by proxy, was not bound by a resolution of the directors present at such meeting, authorising the resident director to accept bills for the company. *Brown* v. *Byers*, 252

MONEY HAD AND RECEIVED.

See TURNPIKE ACT.

S., the owner of a farm, orally employed defendant to sell it for him. Defendant, without naming the seller, agreed, by written memorandum, to sell the farm to the plaintiff for 2700*l.*, and gave instructions to an attorney to prepare a contract of sale by S. to plaintiff. Plaintiff paid defendant 100*l.* deposit in part of the purchase-money, and afterwards signed the contract for sale by S. to himself, by which contract he agreed to pay down immediately on its execution 100*l.* as a deposit, for which S. undertook to pay interest at 4*l.* per cent. till the completion of the purchase. The contract was afterwards rescind-

ed for want of title in the seller, S. Defendant, before he had notice of the rescinding, paid S. 50*l.*, and retained the other 50*l.*, though without the consent of S., under an agreement by S. to give him one-half of any amount above 2600*l.* which defendant might get for the farm:—*Held*, that plaintiff could not recover any part of the 100*l.* from defendant. *Hurley* v. *Baker*, 26

MONEY PAID.

The plaintiff accepted a bill for 25*l.* for the accommodation of F., who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession-money. F. was to get the bill discounted by the defendant or elsewhere, and to give the plaintiff the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that the plaintiff had had no value for his acceptance. The defendant indorsed it over, and kept the proceeds. The holder sued the plaintiff, who thereupon paid him the whole amount of the bill:—*Held*, that the plaintiff had no right of action against the defendant as for money paid to his use on a request implied by law; but that his remedy was against F., on an implied contract to indemnify the plaintiff for lending him his, the plaintiff's, acceptance. *Asprey* v. *Levy*, 851

MORTGAGE.

Stamp.

In 1773, J. J. mortgaged premises in fee to M. to secure 1000*l.*, with the usual proviso for redemption on payment &c., and without any power of sale. In 1837, by indenture between R. J., the heir-at-law of J. J., of the first part; R., the devisee of M., of the second; and H., of the third; reciting that the 1000*l.* was still due to R., and that H. had agreed to pay it off, and had advanced to R. J. 1723*l.* more; R., in consideration of the 1000*l.*, and R. J., conveyed the same premises to H. in fee, subject to a proviso for redemption on payment of 2723*l.* and interest, with a covenant by R. J. to pay that sum on a day different from that limited in the deed of 1773, and a power of sale in case of non-payment of the said sum of 2723*l.* and interest, or any part thereof, on the day thereby limited for payment thereof:—*Held*, that this deed required an ad valorem stamp in respect of the 1723*l.*, and also a deed stamp in respect of the new security taken for the 1000*l.* *Humberston* v. *Jones*, 763

MORTMAIN ACTS.

A testator devised houses to trustees upon trust for sale, and to apply the proceeds to pay legacies of 50*l.* to each of three charitable and religious institutions. He also gave legacies to other persons, and made his brother residuary legatee:— *Held*, that the trust estate was not avoided by the Statute of Mortmain, 9 Geo. 2, c. 36, though the houses went to the heir-at-law, and not to the charitable uses. *Doe* d. *Chidgey* v. *Harris*, 517

NEW ASSIGNMENT.

See PLEADING, VI, 1.

NEW TRIAL.

See EVIDENCE, 4.
PRACTICE, 4.

PARTICULARS (OF DEMAND).

See TITHES.

In Actions for Railway Surveys.

In actions by engineers and other persons employed in constructing railways, the particulars of demand must

(2). *Negative pregnant.*

In trespass, where the defendant pleads lib. ten. in J. S., and justifies the trespasses as the servant of J. S., and by his command, a replication that the defendant did not, as the servant of J. S., and by his command, commit the trespasses, is bad on special demurrer, as involving a negative pregnant. *Jones* v. *Jones*, 699

II. *Declaration.*

Several Counts—Demurrage.

Since the General Rule, Hil., 4 Will. 4, part 2, art. 6, a count on a charterparty, going for demurrage and detention of the ship, cannot be joined with an indebitatus count for demurrage; and the latter count will be struck out as in "apparent violation" of the above rule. *Mathewson* v. *Ray*, 329

III. *Pleas in Bar.*

(1). *In Slander by Husband and Wife.*

To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff is a good plea in *bar*. *Chantler* v. *Lindsey*, 82

(2). *Non assumpsit, in Action on Bill or Note.*

By 5 & 6 Vict. c. 22, s. 40, the general issue may be pleaded, and that act and the special matter given in evidence, in defence to an action on a security given by a bankrupt with intent to persuade a creditor to forbear opposing or consent to the allowance of his certificate:—*Held*, that the general issue, non assumpsit (by statute), may be pleaded under this enactment, in an action on a bill or note, notwithstanding Reg. Gen., Hil., 4 Will. 4, Pleadings in Assumpsit. *Weeks* v. *Argent*, 817

(3). *Payment.*

In debt, a plea of payment of a sum of money in satisfaction of all the causes of action in the declaration mentioned, is an answer as well to the damages as to the debt. *Triston* v. *Barrington*, 61

(4). *Payment into Court.*

1. A plea of payment into court must be pleaded, in its commencement, to the *further* maintenance of the action; and if it be pleaded to the maintenance of the action generally, this defect is not, upon *special* demurrer, cured by its *concluding* to the further maintenance of the action. *Rosling* v. *Muggeridge*, 181

2. Assumpsit. First count on a bill of exchange for 26*l.* 13*s.* 2*d.* Second count for 30*l.* for money lent, and on an account stated. Pleas—first, non assumpsit to the last count, except 10*l.* 9*s.* 1*d.*; second, plea to the whole declaration, except 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment before action brought, and a set-off; last plea, as to 10*l.* 9*s.* 1*d.*, parcel of the first, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment into court of 11*l.* (See Reg. Gen., Trin., 1 Vict.) On special demurrer to the last plea, it was held bad, for setting up as a defence payment of a less sum than the whole sum admitted to be due and pleaded to, without other answer as to the difference than no damages ultra the sum paid in.

Where the declaration has a count on a bill, and also an indebitatus count for the consideration for the bill, e. g. money lent, *semble*, that, to prevent the plaintiff from recovering on both counts by due payment into court, the defendant should plead to both counts, that the bill was given on account of the debt in the second count, and then allege payment into court of the

amount of the bill and interest. *Tattersall* v. *Parkinson*, 752

3. A plaintiff brought separate actions against two joint contractors, one of whom paid 300*l.* into court; and the plaintiff, without replying in that action, gave notice of trial in the other. The Court allowed the defendant in this latter action, on payment of costs, to insert on the record a plea of payment into court of 300*l.*, without actually paying in the same. *Rendel* v. *Malleson*, 828

IV. *Replication.*

(1). *De Injuriâ.*

1. In trespass for taking chattels, if the defendant justifies the seizure under a heriot custom, the plaintiff may reply de injuriâ absque tali causâ. And if there are several pleas claiming several heriots in respect of different tenements, one replication de injuriâ will suffice. *Price* v. *Woodhouse*, 1

(2). *Departure.*

Assumpsit. — Declaration stated, that certain persons using the name and style of J. Boulcott & Co., by that name and designation drew a bill of exchange on Messrs. G. and E. Woolcott, and inclosed *the said* bill to defendant, who indorsed it to plaintiffs. Averment, that the drawees did not pay the bill when due. Plea, that the plaintiffs were and are the persons mentioned in the count as using the name and style of J. Boulcott & Co., and as so making the bill by it; and that the indorsement of it to defendant was in fact an indorsement by plaintiffs in the said name and style of J. Boulcott & Co., and that they so indorsed it to him *before* he indorsed the same to them, averring that at the time of his so indorsing the bill to plaintiffs they were liable to pay the amount to him according to their previous indorsement. Replication, after setting out an agreement between the plaintiffs and defendant and G. and E. Woolcott, to forbear and give time to them respectively to pay another bill accepted by E. W., and afterwards indorsed to defendant, and by defendant to plaintiffs, till the time for payment of the bill declared on had elapsed, averred that plaintiffs had forborne to sue accordingly:—*Held* bad, on special demurrer, for departure from the declaration. *Boulcott* v. *Woolcott*, 584

V. *Special Demurrer.*

Where a party demurs specially to several pleas, &c. on the same grounds, the causes of demurrer to all after the first are sufficiently stated by saying that the plea, &c. is insufficient, "for the like causes and grounds of objection which have been taken to the said —— plea." *Braham* v. *Watkins*, 77

VI. *In Trespass.*

(1). *New Assignment.*

Trespass for breaking and entering the plaintiff's close, and damaging the fences, &c. Plea of justification under a right of way. New assignment, that the action was brought for a trespass on a certain other portion of the said close, setting out that portion by abuttals. Plea to the new assignment, that, before the said time when &c., and whilst the defendant so had the right to the said way in the first plea mentioned, the plaintiff obstructed the way in the first plea mentioned, by digging a trench across the same; and because the defendant could not remove the obstruction, he did, for the purpose of avoiding the same, and using the way, depart out of the same, along the said other portion of the close in the new assignment mentioned; and because the said fences in the new assignment mentioned were standing on a portion of the close in the new assignment mentioned, and that without breaking and damaging

the same he could not go over the residue of the said close in which &c., he did necessarily a little break and damage the said fences, &c. Replication, de injuriâ:—*Held*, (*Platt*, B., dissentiente), 1st, that the right of way stated in the plea to the declaration was not admitted by the plaintiff in his new assignment; and, 2ndly, that the right being re-asserted, though informally, in the plea to the new assignment, it was put in issue by the replication, so as to throw the onus of proving it on the defendant. *Robertson* v. *Gantlett*, 289

(2). *For Distraining Goods—Virtute cujus.*

Trespass for breaking and entering plaintiff's dwelling-house, locking the doors, and expelling the plaintiff. Plea, justifying all the trespasses except the expulsion under a distress for rent, alleging that defendant kept and impounded it in the dwelling-house, &c., and in order safely to impound and keep it, necessarily locked and fastened the doors of the dwelling-house, and afterwards caused the goods to be duly appraised and duly sold in satisfaction of the rent and costs of distress and sale. Replication, that defendant broke &c. the house, locked the doors, and seized, took, and converted the goods of his own wrong and for *another and different purpose* than that mentioned in the plea, i. e. for the purpose of ejecting &c. the plaintiff from the possession of the dwelling-house, concluding with a verification. Demurrer. *Semble*, that the replication was bad for not traversing defendant's entry for the purpose of distraining, and concluding to the country, instead of raising an immaterial issue on the intention of the defendant in entering.

Semble, also, that the plea need not aver notice of the distress, with the cause of the taking, to have been given, according to 2 W. & M., sess. 1, c. 5, s. 1, and that the plea, having perfectly answered the seizure, was not rendered bad in substance by going on unnecessarily to answer matters of mere aggravation laid in the declaration, viz. the conversion of plaintiff's goods.

Held, that the plea should have shewn that the house, or that part of it of which the doors were locked, was the most fit and convenient place for securing the distress, or the tenant might be improperly kept out of possession. *Woods* v. *Durrant*, 149

POOR-RATE.

Warrant of Distress for, Form of—Publication of Rate.

A warrant of distress for poor-rates need not in terms state that the refusal to pay the rate was proved *upon oath*; it is enough to state that it was *duly* proved. The misrecital, in a warrant of distress for poor-rates, of the *date* of the rate, is not material.

Under 1 Vict. c. 45, it is a sufficient publication of a poor-rate if a copy of it be affixed, before divine service, on the Sunday next after its allowance, on the *principal or most usual* door of all the churches and chapels of the Established Church within the parish, in which divine service is performed. It is not necessary to publish it on *all* the doors of any church or chapel; nor on the door of a church or chapel in which divine service has ceased to be performed; nor on the door of any building, not being a church or chapel, in which divine service is performed. *Ormerod* v. *Chadwick*, 367

PRACTICE.

See Costs.
Scire Facias.

(1). *Appearance sec. Stat.*

Where a plaintiff sues in person, he

may in person appear for the defendant, sec. stat., although that case is not provided for in the forms given in the schedule to the 2nd section of the Uniformity of Process Act, 2 Will. 4, c. 39. *Smith* v. *Wedderburne*, 104

(2). *Time to plead—"Peremptory" Order.*

An order "peremptory" for time to plead does not preclude the defendant from again applying by summons for further time; and if he take out such further summons, judgment signed for want of a plea after the summons is returnable is irregular. *Beazley* v. *Bailey*, 58

(3). *Striking out Demurrer.*

On a rule for striking out a demurrer, under Reg. Gen., Hil., 4 Will. 4, r. 2, the Court set it aside and struck out the pleadings connected with it, the defendant to pay plaintiff's costs of preparing for trial and attending to try the cause, and of the application to set aside the demurrer, and take short notice of trial; or judgment to be for plaintiff on the whole record. *Tucker* v. *Barnesley*, 54

(4). *Time for Motion for new Trial.*

Leave was given to a defendant to move for a new trial after the first four days of a term; but the name of the case was not inserted in the "new trial motion paper," nor was any notice of the circumstances given to the plaintiff. The plaintiff signed judgment on the fifth day of the term. A rule for a nonsuit or new trial was afterwards served on the plaintiff's attorney. A rule was granted to discharge that rule, but was ordered to stand over till the merits of the first granted rule should be disposed of. The defendant's proper course would have been to have moved to set aside the judgment. *Lloyd* v. *Berkovitz*, 31

(5). *Discontinuance.*

After judgment for defendant on demurrer to one of several counts, the plaintiff took out a side-bar rule to discontinue the action generally, (see Reg. Gen., Hil., 2 Will. 4, art. 106). The defendant's costs, not of the demurrer only, under 3 & 4 Will. 4, c. 42, s. 34, but of the whole action, were taxed on the rule to discontinue, treating that rule as the termination of the action, and were received by defendant's attornies as defendant's costs "on discontinuance of the action." Judgment was entered up on the record for the defendant on the first count only:—*Held*, that the discontinuance, being issued after judgment without leave of the Court, was irregular, and that the judgment was also irregular. The judgment was set aside without costs. *Benton* v. *Polkinghorne*, 8

(6). *Non pros.*

After leave given to amend the declaration upon payment of costs, the defendant did not serve a rule to plead several matters, or produce to the Master the draft pleas as meant to be amended, with 6*s.* 8*d.* costs for amendment. The plaintiff replied to the old pleas, and made up and delivered the issue, with notice of trial, though the defendant was not under terms to rejoin gratis. The delivery of the issue was set aside; but—*Held*, that, as no production of the intended new pleas took place on taxing the costs of amendment, the defendant had no right to sign judgment of non pros. *Rishworth* v. *Dawes*, 440

(7). *Judgment as in case of Nonsuit.*

1. An action of debt was brought in the joint names of the official and trade assignees of a bankrupt, but without the knowledge or consent of the former, who, as soon as he was

made acquainted with it, obtained a rule against his co-plaintiff, to stay the proceedings until he gave security for the costs. This rule was made absolute, and served on the defendant in the action. The cause had stood for trial at the sittings in the same term, but had been made a remanet to the sittings after the term, on the application of the defendant, on the ground of the absence of a material witness. At the latter sittings the record was withdrawn:—*Held*, that the defendant was entitled to move for judgment as in case of a nonsuit.

The Court will discharge a rule for judgment as in case of a nonsuit, on a peremptory undertaking to try given by one of two plaintiffs, though the other protests against it. *Laws* v. *Bott*, 362

2. Judgment as in case of nonsuit may be moved for by one of several defendants, though other defendants have moved for costs of the day for not proceeding to trial. *Bridgeford* v. *Wiseman*, 439

(8). *Staying Proceedings in second Action for same Cause.*

Where, in an action of debt for work and labour, the plaintiff obtained a verdict, but the Court granted a new trial, on the ground that he ought to have declared specially, and he thereupon, without discontinuing that action, brought another for the same cause in assumpsit, declaring specially, the Court stayed the proceedings in the latter action until the former was disposed of. *Haigh* v. *Paris*, 144

PRINCIPAL AND SURETY.

1. The plaintiff, a shareholder in a banking company, became a surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition-deed, to which the plaintiff and the banking company were parties, whereby he assigned his property to trustees for the benefit of his creditors; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having been compelled to pay the debt to the banking company—*Held*, that he was entitled to recover back the amount, in an action for money paid, from the defendant. *Kearsley* v. *Cole*, 128

2. The defendant entered into a bond to the plaintiffs in the penal sum of 250*l.*, which recited, that, whereas R. J. had agreed to become tenant to the plaintiffs of a public-house, and it was stipulated, on the letting, that R. J. should take from the plaintiffs all the ale, spirits, &c. which should be consumed on the premises, and that he should become bound with a surety to pay for all ale, &c. which he should receive from the plaintiffs, to the amount of 50*l.*, before he should have a fresh supply from them of the same, and so should continue to do from time to time, so long as he should continue tenant of the plaintiffs; and that, when he should cease to be such tenant, the surety should be liable to the plaintiffs for such sum, not exceeding 50*l.*, which the said R. J. should or might then owe to the said plaintiffs, for ale, &c. supplied by them to him. The condition then was, that, if R. J. should from time to time pay the plaintiffs for all the ale, &c. which he should from time to time have had from them, at an amount not exceeding 50*l.*, before he should have had a fresh supply of the same, and when he should become indebted to them in that sum; and if the said R. J. should pay the plaintiffs all sum and sums of money which he should owe them for ale, &c., not exceeding 50*l.*, when he should

RAILWAY ACT.

(1). *Validity and Construction of Bye-law under.*

By 5 Will. 4, c. x, (local), the London and Croydon Railway Company was incorporated. By s. 106, they were authorised to make bye-laws for the good government of their affairs, for regulating their proceedings, and for the management of the undertaking, and of the officers and servants of the company in all respects, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said company shall seem meet, not exceeding the sum of 5*l.* for each offence;" such bye-laws to be "binding upon and be observed by all parties;" provided they were not repugnant to the laws of England, or the directions of the act. By s. 148 the company were empowered to make orders for regulating the travelling upon and use of the railway, and for or relating to travellers passing thereon; such orders and regulations to be binding upon such travellers, on pain of forfeiting and paying a sum not exceeding 5*l.*, which the company shall attach to a default. By s. 163, penalties and forfeitures imposed by the *act*, or by any *bye-law*, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices, one-half the penalty to go to the informer, and the other half to the company. By s. 165, any officer or agent of the company may seize and detain any person whose name and residence should be unknown to such officer or agent, who shall commit any offence against the act, and may convey him &c. before a justice, without any warrant or other authority than that act. The company made a bye-law, under their common seal, by which each passenger, not producing or delivering up his ticket on leaving the company's premises, was required to pay the fare from the place whence the train originally started:—*Held*, that this was not a bye-law imposing a "penalty or forfeiture;" so that the non-production of a ticket on leaving the company's premises, and the refusal to pay the fare from the place from which the train originally started, did not authorise the arrest of the passenger.

Semble, the only power to apprehend given by sect. 165, is for an offence against the act itself.

Quære, whether the bye-law was reasonable. *Chilton* v. *London and Croydon Railway Co.*, 212

(2). *Action for Calls—Change of Undertaking.*

A holder of scrip certificates for shares to be allotted at a future time by a contemplated railway company, executed the subscribers' agreement under seal, and sold his scrip in the market. An act of Parliament was afterwards obtained for making the railway, and his name was registered as a shareholder by the company without his sanction:—*Held*, that, till the name of the vendee of the shares was registered as the holder of them, the original holder was liable for calls made on them after their sale.

The subscribers' agreement was for forming a company to make a railway "from D. to M., and thence to A.," and authorised the directors to do all the transactions necessary for forming "a railway from D. to M. and A." It also bound the subscribers to submit to such regulations as might be imposed by the legislature. The act afterwards obtained empowered the company to buy and work a canal from M. to A., and to make a railway from D. to M. only, and incorporated the Companies' Clauses Consolidation Act, 8 Vict. c. 16:—*Held*, that the un-

dertaking sanctioned by the act was not so different from that pointed out in the subscribers' agreement as to save the subscribers from being bound by it. *Midland Great Western Railway Co. (Ireland)* v. *Gordon*, 804

RAILWAY COMPANY.

See EJECTMENT.
INTEREST, 1.

RAILWAY SCRIP.

See STAMP, 2.

RAILWAY SHARES.

Illegal Sale of—Pleading.

In an action of assumpsit for money had and received, the defendant pleaded, as to 94*l.* 2*s.* 6*d.*, parcel &c., that, after the passing of the 7 & 8 Vict. c. 110, and after the 1st November, 1844, the defendant, as the broker and agent of the plaintiff, sold on account of the plaintiff fifteen scrip shares in a certain joint-stock company, called the Boston, Newark, and Sheffield Railway Company, for 94*l.* 2*s.* 6*d.*; the formation of which company was commenced after 1st November, 1844, and which, at the time of such sale, was a joint-stock company within the provisions of the said act, that is to say, a partnership whereof the capital was agreed and intended to be divided into shares, &c., and not being a banking company, &c. [negativing the excepted cases, mentioned in the enacting part of the 7 & 8 Vict. c. 110, s. 2]; and that the 94*l.* 2*s.* 6*d.*, parcel &c., was money received by the defendant as the proceeds of such sale:—*Held* bad, on demurrer, for not shewing that the company was a railway company, the execution of whose works could be carried into effect without the assistance of Parliament, and therefore not within the provision at the end of the 7 & 8 Vict. c. 110, s. 2, which is, in legal effect, an exception.

Semble, that if the sale *had* been illegal, the defendant, the broker who negotiated the sale and received the money, had no right to set up the illegality of the transaction in answer to an action for money had and received, the purchaser not having insisted on such illegality. *Bousfield* v. *Wilson*, 185

RECEIPT.

See STAMP, 3.

SATISFIED TERMS ACT.

See FINE.
LIMITATION ACT, 13.

SCIRE FACIAS.

By Executor—Writ of Error.

A plaintiff obtained a verdict, subject to a special case, on the argument of which he obtained judgment in this court. The defendants having liberty to turn the case into a special verdict, did so, and brought a writ of error into the Exchequer Chamber. Before the argument in that court the plaintiff died, having made R. his executor. In December, 1845, the judgment of this Court was affirmed in the Exchequer Chamber. The defendants sued out a writ of error into the House of Lords, and assigned errors thereon; and on the 6th of March, 1846, petitioned the House that R. might be made a party to the writ of error. On the 11th of May the House of Lords ordered the record to be remitted to this court. On the 24th of August the defendants again petitioned the House of Lords that R. might be made a party to the judgment; but no order was made thereon. On the 18th of November, R. sued out a scire facias to have execution. The Court refused, on the application of the defendants, to stay all proceedings under the scire facias, and allowed

R. to sign judgment, with a stay of execution for six weeks, to enable the defendants to sue out a fresh writ of error. *Riddle* v. *Grantham Canal Navigation Co.*, 882

SET-OFF.

See PARTICULARS OF SET-OFF.

SHERIFF.

Action against, for Extortion—Pleading.

The stat. 29 Eliz. c. 4, (against extortion by sheriffs, &c.), is not repealed by the 1 Vict. c. 55; but the only effect of the latter statute is to exempt from the penalties of the statute of Elizabeth the cases in which the sheriff shall take no larger fees than shall be allowed by order of the judges. Therefore, in a declaration on the case for extortion, on the statute of Elizabeth, it is not necessary to negative the defendant's having had authority under the statute of Victoria to take the fees complained of; but that is matter of defence, which should come by way of plea.

The Court would not take judicial notice that an order of the judges, allowing a scale of fees under the stat. 1 Vict. c. 55, was made before the time of the alleged extortion stated in the declaration.

The declaration stated that the defendant levied, out of goods of the plaintiff's debtor, a certain sum, to wit, 28*l.* 10*s.*; and that he wrongfully took from the plaintiff, for serving and executing the execution, a large sum, to wit, 16*l.*, the same being a larger sum &c. than by the statute limited, of and for the sum so levied, that is to say, a large sum, to wit, the sum of 15*l.*, more than in the said act limited in that behalf. *Semble*, that this allegation of the extortion was bad in point of form; for that the poundage allowed upon this levy by the statute being 1*l.* 8*s.*, the statement that the defendant took 16*l.*, and that that sum was excessive by 15*l.*, was repugnant; and if the words, "to wit, the sum of 15*l.*," were rejected as surplusage, there was no sufficient allegation of the damage. *Pilkington* v. *Cooke*, 615

SLANDER.

See PLEADING, III, 1.

(1). *When actionable.*

The use of words imputing an indictable offence is actionable or not according to the sense in which they may fairly be understood by bystanders not acquainted with the matter to which they relate, or which may render them a privileged communication; and the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial. *Hankinson* v. *Bilby*, 442

(2). *Of Person in his Trade.*

An action of slander cannot be maintained by a lessee or renter of tolls, for words spoken of him in his character of contractor of tolls, after he has ceased to contract for renting the tolls respecting which the words are spoken. *Semble*, the renting of tolls is not a profession or trade. *Bellamy* v. *Burch*, 590

(3). *Pleadings in.*

Case.—Declaration stated, for that *whereas* the defendant, contriving and wickedly intending to injure the plaintiff, to wit, on &c., in a certain discourse in the presence of &c., spoke and published of and concerning the plaintiff the false, malicious, and defamatory words following, stating the words, and averring special damage to the plaintiff in his business:—*Held* bad, on special demurrer, for charging the grievances to have been

committed by the defendant by way of recital only, and not directly or positively. *Brown* v. *Thurlow*, 36

SPECIAL JURY.

Discharge of Rule for, where Crown is interested.

The subject's right to try a case by a special jury is not affected by any suggestion of the Attorney or Solicitor-general, without affidavit, that the Crown is interested in the defendant's estate, though that suggestion would be sufficient to obtain a trial at bar. *Dunn* v. *Cox*, 439

STAMP.

See LEASE, 1.
MORTGAGE.

(1). *Agreement relating to Sale of Goods.*

The following memorandum was handed by defendant, a trader, to plaintiff, an auctioneer:—"Memorandum of 107*l.*, had by me of S. (plaintiff), being an advance on books sent in for immediate sale by auction:" signed by the defendant. The books were sold, and an action having been brought by the auctioneer for a balance due to him on the sale, the above memorandum was held to "relate to the sale of goods," and therefore to be admissible in evidence without a stamp, under the exemption in 55 Geo. 3, c. 184, sched., tit. "Agreement." *Southgate* v. *Bohn*, 34

(2). *On Agreement for Sale of Railway Scrip.*

Scrip in a railway company is not "goods, wares, or merchandise," within the exemption in the Stamp Act, 55 Geo. 3, c. 184, sched., pt. 3, tit. "Agreement."

In the morning of a day the defendant gave the plaintiff a verbal order for fifty shares in a railway company. In the afternoon of the same day the defendant signed a memorandum, that he had bought of the plaintiff fifty shares in the company, at 10*l.* a share; which memorandum was handed to the plaintiff:—*Held*, that it required an agreement stamp. *Knight* v. *Barber*, 66

(3). *Agreement — Promissory Note —Receipt.*

In an action for money lent, &c., the following document was tendered in evidence:—"Berwick, 16th March, 1841. 170*l.* Received from Mrs. B. Taylor the sum of 170*l.* for value received, for which I promise to pay her at the rate of 5*l.* per cent. from the above date. A. N. Steele:"—*Held*, not to require a stamp, either as a receipt, a promissory note, or an agreement of the value of 20*l.* *Taylor* v. *Steele*, 665

STATUTE.

See BURIAL FEES.
CONDITION PRECEDENT.
LONDON COAL ACT.

STATUTE OF USES.

A deed, which may operate either at common law or under the Statute of Uses, cannot, in pleading, be relied on as operating under the statute, unless an election that it shall so operate is expressly averred; and *quære*, whether an entry under such a deed is not conclusive of an election that it shall operate at common law.

Semble, under a grant to A., B., and C., their *executors*, &c., of liberty to get the coal under particular closes till all the coal should be gotten, an interest passes to the executors of the survivor, provided the deed operates under the Statute of Uses. *Haigh* v. *Jaggar*, 525